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Notes

Deregulation of the Practice of Law: Panacea or Placebo?

by
MEREDITH ANN MUNRO*

A strong and vocal movement is growing to deregulate the legal profession by lifting restrictions on the unauthorized practice of law, enabling any lay practitioner to provide legal services.[1] Exhortations to "dismantle the legal monopoly!"[2] and "relinquish the barricades"[3] are published in newspapers and legal publications. This drive stems from the high costs of legal services and the resulting inaccessibility of the legal system. Public legal service programs and private pro bono efforts are not satisfying the need for legal services; roughly eighty-five percent of those who desire legal help are not receiving it.[4]

In California, lay entrepreneurs cater to this demand for legal services by offering the public everything from do-it-yourself divorce

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1. Legal commentators urging some level of deregulation include: C. WOLFRAM, MODERN LEGAL ETHICS 830-32 (1986) (generally advocating deregulation); Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?* 1980 AM. B. FOUND. RES. J. 159, 214-15 (proposing abolition of the exclusive right of lawyers to practice law and retention only of the rights of lawyers to use the title "lawyer" and to present cases in court); Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question,* 4 NOVA L.J. 363, 376 (1980) (advocating deregulation of a certain amount of law determined to be acceptable by an independent agency's balancing of interests between lawyers, lawyers' "competitors," and consumers); Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,* 34 STAN. L. REV. 1, 94-96 (1981) (favoring a number of variations based on limited deregulation); Note, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules,* 132 U. PA. L. REV. 1515, 1541-45 (1984) (proposing a plan that would provide for voluntary certification while still allowing those persons who do not wish to become certified to practice law unprohibited).

2. Bandow, *Business Forum: Assaulting the Barriers to Legal Practice; A Brazen System of Self-Enrichment,* N.Y. Times, Mar. 15, 1987, at 2, col. 3 (city ed.). *See also* Sylvester, *The People vs. Lawyers; More Groups Cash in on the Hatred of Attorneys,* Nat'l L.J., Jan. 9, 1984, at 1, col. 1.

3. Rhode, *supra* note 1, at 99.

4. *See infra* note 54 and accompanying text.

kits to form-filling services.[5] But these lay practitioners operate in legal limbo. They may be violating California law, which prohibits the unauthorized practice of law,[6] but the California Bar (Bar) is not actively seeking their prosecution.[7] Critics of the Bar's "monopoly"[8] of the practice of law point to the commercial successes of lay practitioners as proof that not all legal problems require the services of a lawyer.[9] These critics reject the traditional argument that lay prac-

5. The number of persons registered with the National Association of Independent Paralegals, an association of lay practitioners, rose from 237 in 1985 to 21,141 in 1989; roughly half were in California alone. Shao, *Perry Mason They're Not,* BUS. WK., Nov. 20, 1989, at 83. The 1989 Pacific Bell Directory (San Francisco, 1989-90) has well over 30 different listings of individuals or groups under "Divorce Assistance," "Legal Clinics," "Paralegals," and "Legal Forms." The 1990-91 Pacific Bell Directory for Greater Los Angeles has more than 50 listings under the same headings. Although some of these listings offer services in conjunction with attorney supervision, a majority appear to operate solo.

Numerous well-known publishers also offer self-help legal manuals. HALT (Help Abolish Legal Tyranny), a Washington, D.C. organization founded in 1978, publishes self-help guides and also lobbies for legal reform such as deregulation. Silas, *Stop to HALT? Unlicensed Practice Alleged,* 71 A.B.A. J., Oct. 1985, at 21; Silas, *HALT Probe Over: Self-Help Legal Guides OK,* 72 A.B.A. J., Feb. 1986, at 18 (Dallas subcommittee of the Texas Supreme Court dropped its unauthorized practice of law investigation of HALT). Nolo Press, a California publisher, publishes a wide variety of self-help legal books. Nat'l L.J., Jan. 9, 1984, at 1, col. 1. *See, e.g.,* N. DACEY, HOW TO AVOID PROBATE (1965) (a Crown Publishers, Inc., publication that provides forms and instructions on drafting wills and trusts).

6. It is a misdemeanor and contempt of court to advertise or otherwise represent oneself as a lawyer or to practice law in California without being an active member of the California Bar. CAL. BUS. & PROF. CODE §§ 6125-6127 (West 1990). Likewise, a member of the California Bar may not aid any person or entity in the unauthorized practice of law or practice law in a jurisdiction outside California where to do so would violate that jurisdiction's regulations. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-300 (1989). A lawyer, however, is not prohibited from employing the services of paraprofessionals and delegating functions to them so long as the lawyer supervises the delegated work and retains responsibility for the work. A lawyer also is not prohibited from providing professional advice and instruction to non-lawyers such as claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies whose employment requires knowledge of the law, or counseling non-lawyers who wish to proceed *pro se. See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 comment (1989). This Note focuses on the unauthorized practice of law by lay practitioners, however, and does not discuss the unauthorized practice of law by lawyers.

7. Independent paralegals have been operating under little threat of prosecution in California for almost twenty years. Hall, *Bar Committee on Legal Technicians Gets Fast Deadline,* L.A. Daily J., Oct. 24, 1989, at 9, col. 1. *See infra* notes 37-40, 47-49, 95, and accompanying text.

8. The Bar's control over the practice of law actually resembles a trade association or cartel, not a monopoly. *See* Rhode, *supra* note 1, at 4 n.7.

9. "The commercial success of divorce kits and similar nonlawyer intrusions suggests that clients both find lawyer charges in the area unjustifiably high and believe that having two highly trained and qualified lawyers on each side of a dissolution proceeding is a serious squandering of educational, legal and economic resources." C. WOLFRAM, *supra* note 1, at 828-29. *See also* Engel, *The Standardization of Lawyers' Services,* 1977 AM. B. FOUND. RES.

titioners, not bound by the educational and ethical restraints that bind lawyers, pose a risk to the public of incompetence or fraud.[10] Even those critics who do concede some threat of fraud or incompetence by lay practitioners argue that the public should be given the opportunity to weigh these risks with the possible cost benefits in a free-market setting.[11]

In 1987, the California Bar created the Public Protection Committee (Committee) to help identify areas where lay practitioners could effectively provide legal services.[12] After conducting public hearings and surveying California consumer protection agencies and other states' bars, the Committee recommended abolishing the prohibition of the lay practice of law. The Committee's proposal essentially would allow persons to practice law without meeting educational requirements or following ethical restraints. Lay practitioners would be required only to register with a state agency. California would be the first state to adopt such a radical deregulation of the legal system.[13]

J. 817, 840 ("lay specialists have participated with great success, attracting a high enough volume of business to justify their standardized operations and thereby undercutting their lawyer-competitors").

10. *See infra* notes 66-74 and accompanying text.

11. *See infra* note 152.

12. OFFICE OF PROFESSIONAL STANDARDS, STATE BAR OF CALIFORNIA, REPORT OF THE PUBLIC PROTECTION COMM. (1989) (distributed for public comment Dec. 1989, available from the California State Bar Office of Professional Standards) [hereinafter REPORT I].

Recently, Senator Robert Presley and Assemblywoman Delaine Eastin have sponsored identical bills, drafted by HALT, that essentially mirror the Committee's proposal. *See* Preprint Senate Bill No. 9 (1990); Preprint Assembly Bill No. 14 (1990) [hereinafter Deregulation Bill] (both bills are available at the California State Bar Office of Professional Standards).

The Bar's second committee group, the Commission on Legal Technicians, discussed in Part III. D., also recently introduced a proposal supporting the proposal of this Note in many respects. *See* REPORT OF THE STATE BAR OF CALIFORNIA COMMISSION ON LEGAL TECHNICIANS, (1990) [hereinafter REPORT II] (available at the California State Bar Office of Professional Standards). See Part III. D. for the status of REPORT II with respect to the Bar, legislature, and courts.

13. All states prohibit the unauthorized practice of law, but there is no consensus on what in fact constitutes the unauthorized practice of law. To date, only one state, Washington, defines the unauthorized practice of law to exempt a very limited form of practice by lay practitioners. On January 1, 1983, the Supreme Court of Washington adopted Rule 12 of the Admission to Practice Rules, which authorizes "Limited Practice Officers" to select, prepare, and complete standard forms incident to the closing of limited real estate and property transactions. WASH. CT. A.P.R. 12(a), (d) (1983). The forms are pre-approved by a board, which consists of lawyers and "business representatives," *id.* 12(b)(2)(vii), and the officers may not give "legal advice." *Id.* 12(g)(4). The officers must pass an examination, Rules for Admission & Certification to Limited Practice Under APR 12, 12(b)(ii), complete continuing education, *id.* 15, and follow disciplinary rules, Disciplinary Rules for Limited Practice Officers 1.1.

In Illinois, a bill (introduced on June 8, 1990 by Senator Emil Jones) is pending that

To fully understand the impact such deregulation would have on the California legal system, one first must appreciate the rules currently governing the unauthorized practice of law. Part I of this Note examines the current California unauthorized practice of law rules.[14] Part II discusses the inefficiencies of the legal system, focusing on the poor and middle classes' lack of adequate access to legal help and the profession's failure to address these problems fully. This Part also presents deregulation proposals claiming to correct these deficiencies.[15] Part III delineates the Committee's research, findings, and proposal to deregulate. Part IV analyzes the Committee's proposal.

This Note concludes, in Part V, that existing unauthorized practice of law rules are insupportable to the extent that the rules do not recognize that some types of legal services are sufficiently standardized to enable lay practitioners to perform them competently. Full deregulation is not the best solution, however, because deregulation

would allow lay practitioners to represent individuals at administrative hearings and at real estate closings, and to draft wills and trusts. Independent Paralegal Licensing Act, Bill No. 2314. The bill sets forth educational and ethical requirements. *Id.*

A bill that would have allowed licensed lay practitioners to perform substantive legal work "customarily, but not exclusively performed by an attorney" was defeated in Maryland. House Bill No. 1029, House of Delegates (Feb. 5, 1988). Another bill, sponsored by the Committee on the Judiciary, that would have allowed lay practitioners to fill out legal forms in divorce, bankruptcy, real estate, and adoption matters, never went past the committee stage in Oregon. Suskin, "Excerpt from 'An Overview of Recent Development in Various States with Respect to the Utilization of Legal Assistants,'" *reprinted in* REPORT II, *supra* note 12, at Supp., Appendix 3.

14. The history of the unauthorized practice of law is beyond the scope of this Note; for a comprehensive coverage of this history, see Christensen, *supra* note 1, at 161-201.

15. Numerous proposals suggest altering the existing legal structure to increase access to legal services. This Note only examines proposals by the deregulation faction, *see supra* note 1, and the Committee. Examples of other proposals include: B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 49-53 (1970) (suggesting supportive non-lawyer personnel who would work dependently or independently of lawyers); Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation,* 12 PEPPERDINE L. REV. 1, 22 (1984) (suggesting reducing legal costs through the use of legal clinics and other types of mass marketing methods such as specialization, systems management techniques, increased use of paralegals, and substitution of various forms of capital for labor—all of which would reduce attorney time per matter and reduce the cost of shifting areas of expertise); Nielsen, *Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest,* 9 HOFSTRA L. REV. 625, 662-63 (1981) (advocating nonlawyer ownership of proprietary or management interests in legal-services organizations); Saltzman, *Private Bar Delivery of Civil Legal Services to the Poor: A Design For a Combined Private Attorney and Staffed Office Delivery System,* 34 HASTINGS L.J. 1165, 1176-79 (1983) (suggesting a combined staffed office and a private bar delivery system for civil legal services for the poor); Selinger, *Functional Division of the American Legal Profession: The Legal Paraprofessional,* 22 J. LEGAL EDUC. 22, 29-36 (1969) (advocating a system analogous to the medical profession—fully trained legal technicians would be permitted to perform limited services only upon the "prescription" of a lawyer).

also fails to differentiate between the types of legal services lay practitioners can perform competently and those that are best left to trained attorneys. Deregulation advocates underestimate the actual and potential harm caused by lay practitioners and ignore certain market realities that render the practice of law unsuitable for a free market system. Some legal needs cannot and should not be valued in terms of dollars and cents. Those who lack the financial or educational resources to use the legal market effectively to distinguish between incompetence and competence, illegitimacy and legitimacy, cannot benefit from this open market and even may be harmed by it. Rather, this Note argues for a licensing system that would allow lay practitioners to provide certain standardized legal activities under protective yet unrestrictive guidelines. Limited licensing would both increase supply and lower the cost of legal services while still providing some protection from incompetence and fraud.

I. Current Unauthorized Practice of Law Rules

This Part describes the traditional justifications posited by the California Legislature and courts for the unauthorized practice of law rules, namely protection of the individual consumer and of the judicial system. Notably, neither rationale differentiates between types of legal services. Both therefore ignore the possibility that one may gain expertise in certain standardizable legal services through experience rather than formal education. These rationales assume that lay practitioners would perform less efficiently and produce a substantively lower quality service than fully trained lawyers. The Part then outlines how the coordinate branches of California government have grappled with the problems inherent in regulating such a prevalent and thus somewhat undefinable part of our lives. The resulting confused body of jurisprudence has created a gap between the law and its enforcement, which ultimately defeats the justifications for creating the unauthorized practice of law rules.

A. Justification for the Unauthorized Practice of Law Rules

Crucial to an analysis of the rules regulating the unauthorized practice of law in California is the justification behind these rules: traditionally asserted by the courts and legislature as being the protection of both the public and the judicial system.

The primary motivation for California's unauthorized practice of law rules is the protection of the public from lay practitioners who

are not subject to educational and ethical restraints.[16] From this premise it is argued that because lay practitioners are not required to fulfill any educational requirements or pass competency examinations, they potentially are unable to steer clients through unfamiliar and complex matters of substantive and procedural law.[17] Even practitioners such as real estate brokers and accountants with greater legal expertise in their fields than lawyers may injure their clients by failing to recognize and guard against the legal ramifications of areas of law outside their particular specialties.[18]

The "lack of ethics" argument, distilled to its simplest form, is that legal services should be performed only by those subject to the Bar's and courts' supervision and standards of confidentiality,

16. The California Supreme Court asserted that "'[t]he profession . . . of the law . . . is essentially and more largely a matter of public interest and concern. . . . [Society has an] interest [in being] . . . safeguarded against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession.'" Baron v. City of Los Angeles, 2 Cal. 3d 535, 540, 469 P.2d 353, 356, 86 Cal. Rptr. 673, 676 (1970). The California legislature also has explained that the purpose of the unauthorized practice of law rules is to protect the public. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-100(A) (West 1989). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-2 (1981) ("The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law."). See *infra* note 150 for the educational requirements to become a member of the California Bar.

17. The quality of legal advice and draftsmanship depends not only on legal knowledge, analysis, and expression skills, possessed more generally by lawyers than others, but also on the ability to recognize relevant legal issues. The possible relevance of areas of law may not be recognized or understood by even competent non-lawyers who are knowledgeable in other fields of law. As in the practice of medicine, the original diagnosis of a legal problem may be the most critical element. Probably, more legal rights are lost through ignorance of their existence than through sloppy advocacy to achieve their enforcement. Many lawyers claim that they make more money trying to rectify the mistakes made by laypersons who initially represent themselves or others than they lose by not being consulted in the first instance. Furthermore, since an initial mistake may extinguish legal rights, failure to consult qualified legal counsel may cause irreparable harm. Accordingly, the unauthorized practice laws should continue to have force both within and beyond the courtroom.

Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law,* 1978 UTAH L. REV. 649, 675.

18. In Agran v. Shapiro, 127 Cal. App. 2d Supp. 807, 273 P.2d 619, 626 (1954), the court, in determining whether an accountant had engaged in the unauthorized practice of law, stated:

> The interest of the public is not protected by the narrow specialization of an individual who lacks the perspective and the orientation which comes only from a thorough knowledge and understanding of basic legal concepts, of legal processes, and of the interrelation of the law in all its branches.

See also, Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 174 (1967); Weckstein, *supra* note 17, at 650-51.

undivided client loyalty, and moral integrity.[19] For example, a lay practitioner is not subject to prohibitions against mishandling client funds, charging exorbitant fees, engaging in improper solicitation or misleading advertising, disclosing client secrets, or withholding client documents.[20]

Proponents of the protection of the judicial system rationale argue that the quality of the administration of justice, both procedurally and substantively, is a public good.[21] This rationale builds on the preceding assumption that due to their freedom from state bar regulation, lay practitioners are less competent and less ethical than fully-trained lawyers. This argument then focuses on the effect that lay practitioners have on society as a whole.[22] On a procedural level, because lay practitioners are more apt to bring frivolous suits

19. To become an active member of the California Bar, an applicant must be of "good moral character." CAL. BUS. & PROF. CODE § 6060 (West 1990). The Code, however, does not define "good moral character."

To determine whether she has the requisite "good moral character," the Bar requires an applicant to complete a personal history questionnaire, which asks whether the applicant has been convicted of violating a law or ordinance or has been involved in a law suit or disciplinary action. THE STATE BAR RULE IN PROFESSIONAL ACTIVITIES 4 (A News Background by the Office of Bar Communications and Public Affairs of the State Bar of California) (Sept. 1982) [hereinafter News Background]. If the Committee of Bar Examiners determines that either the applicant's answers on the questionnaire or any other investigation findings warrant her possible disqualification from Bar membership, the State Bar court may hold a hearing. *Id.* at 5. If the Bar court determines the applicant lacks the requisite character, the Committee may refuse to recommend her to the California Supreme Court. *Id.* The applicant may have the California Supreme Court review the Committee's finding before making its decision. *Id.* The California Supreme Court makes the final decision. CAL. BUS. & PROF. CODE § 6064 (West 1990).

Once an applicant gains acceptance to the Bar, her moral character still is under the scrutiny of the Bar. Both the California State Bar Act and the California Rules of Professional Conduct delineate, *inter alia,* ethical standards that bind members. Unlike a violation of the State Bar Act, a violation of the California Rules of Professional Conduct does not give rise automatically to a civil cause of action. *See* Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 658-59, 109 Cal. Rptr. 269, 271-72 (1973). Generally, a member is subject to disbarment or suspension for the conviction or commission of any act involving "moral turpitude, dishonesty, or corruption" whether the act constitutes a misdemeanor or felony. CAL. BUS. & PROF. CODE §§ 6101, 6106 (West 1990). If warranted, a Bar committee may even order a member to be examined by one or more physicians or psychiatrists it designates. CAL. BUS. & PROF. CODE § 6053 (West 1990).

20. In contrast, a lawyer expressly is prohibited from commingling client funds, charging an illegal or unconscionable fee, or retaining property whether or not the client has paid. CAL. RULES OF PROFESSIONAL CONDUCT Rules 4-100, 4-200, 3-700 (1989). Nor may a lawyer disclose client secrets or engage in false or misleading advertising. CAL. BUS. & PROF. CODE §§ 6068, 6152 (West 1990).

21. Michelman, *supra* note 15, at 15.

22. The legal rules themselves reflect this concern for the larger effect. One purpose of the legal rules is "to promote respect and confidence in the legal profession." CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-100 (West 1989).

or deal inefficiently with legitimate claims, society is indirectly harmed by the resultant creation of congested courts and higher court fees.[23] On a substantive level, because lay practitioners are more apt to foster incorrect or non-optimal legal outcomes, the high standards inherently desired in our legal, "moral" society are lowered.[24]

The postulates that lay practitioners will harm the public and the system of justice because these practitioners lack external constraints have resulted in a body of jurisprudence purporting to regulate the practice of law. As the next section will emphasize, an uneasy and often broken alliance between the legal community and the lay community has been created: lay practitioners may perform only clerical-type services.

B. California's Regulation of the Practice of Law

Three sources of jurisprudence bind those who seek to practice law in California: applicable law including the State Bar Act,[25] holdings of the California courts,[26] and California Bar rules and regulations.[27]

Under the State Bar Act, an individual who advertises or holds herself out as a lawyer, or practices law without being an active member of the Bar is guilty of a misdemeanor and contempt of court.[28] The Bar acts as an arm of the judiciary by investigating complaints regarding unauthorized practice of law and then recommending discipline to the judiciary.[29] Anyone from "displaced" attorneys to defrauded customers may file complaints of unauthorized practice of

23. "[C]heaper and lower quality services delivered by personnel governed neither by the rules of the courts nor by fidelity to the values of the legal system would . . . reduce the efficiency and increase the social cost of the administration of justice." Michelman, *supra* note 15, at 21 n.75. *See infra* note 151.

24. "Access to the courts is not just another social or welfare benefit, but an issue that goes to the moral tone of a society and the legitimacy of its institutions. Belief in the priority of the rule of law is a view not confined to lawyers." Cramton, *Why Legal Services for the Poor*? 68 A.B.A. J. 550, 553 (1982).

25. CAL. BUS. & PROF. CODE §§ 6100-6117 (West 1990). The legislature may exercise a "reasonable degree" of control over the practice of law under the state police power. State Bar of Cal. v. Superior Ct., 207 Cal. 323, 331, 278 P. 432, 439 (1929).

26. The judicial power of California is vested in the courts as the legislature deems necessary. CAL. CONST. art. VI, § 1. The courts' power to regulate the practice of law is among the inherent powers of article VI. People v. Turner, 1 Cal. 143, 150 (1850).

27. The California Rules of Professional Conduct were adopted by the Board of Governors of the State Bar of California and approved by the California Supreme Court on November 28, 1988, pursuant to California Business and Professions Code sections 6076 and 6077. CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-100 (West 1989).

28. CAL. BUS. & PROF. CODE §§ 6126-6127 (West 1990).

29. News Background, *supra* note 19, at 30.

law.[30] The Bar may initiate and conduct investigations or delegate the duty to state prosecutors with or without the filing or presentation of a complaint.[31] The Bar has the power to hear and try all matters, including the power to take and hear evidence, administer oaths and affirmations, and subpoena documents and persons.[32] The Bar only may give suggestions, however, because the judiciary exercises independent judgment both with regard to the weight and sufficiency of evidence and with regard to discipline.[33]

The bite of the unauthorized practice of law rules depends on the definition of the practice of law, which the State Bar Act leaves open. California courts have defined the practice of law broadly:

> the doing or performing [of] services in a court of justice in any matter depending therein, throughout its various stages . . . includ[ing] legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in court.[34]

For close cases[35] an even broader interpretation has been used: a person is engaged in the unauthorized practice of law "if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind."[36]

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30. Of course a customer claiming injury from a lay practitioner can attempt to sue without the Bar's help under a theory of contract or tort. *But see infra* notes 178-188 and accompanying text (suggesting the difficulty in bringing a claim of this kind absent actual intentional misrepresentation by the lay practitioner that she is a licensed member of the Bar).

31. CAL. BUS. & PROF. CODE § 6044 (West 1990).

32. *Id.* § 6049.

33. Goldstein v. State Bar, 47 Cal. 3d 937, 766 P.2d 560, 254 Cal. Rptr. 794 (1989) *reh'g denied*; Brotsky v. State Bar, 57 Cal. 2d 287, 300-301, 368 P.2d 697, 699, 19 Cal. Rptr. 153, 160 (1962).

34. People v. Merchants Protective Corp., 189 Cal. 531, 535, 209 P. 363, 365 (1922) (quoting Eley v. Miller, 7 Ind. App. 529, 529, 34 N.E. 836, 837 (1893)).

35. The court in Agran v. Shapiro, 127 Cal. App. 2d Supp. 807, 273 P.2d 619 (1954), acknowledged that whether a particular action constitutes the practice of law is a "question of considerable difficulty," *id.* at 812, 273 P.2d at 623, but stated that the close cases arise "when the service furnished is incidental to the performance of other services of a non legal character in the pursuit of another calling such as that of accounting." *Id.* at 817, 273 P.2d at 626. The court further explained that a "difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with the similar transactions." *Id.*

36. Baron v. City of Los Angeles, 2 Cal. 3d 535, 543, 469 P.2d 353, 358, 86 Cal. Rptr. 673, 678 (1970) (quoting Agran v. Shapiro, 127 Cal. App. 2d Supp. at 818, 273 P. 2d at 626 (1954)). This latter definition was used recently in McKay v. Longsworth, 211 Cal. App. 3d 1592, 260 Cal. Rptr. 250, *reh'g denied* (1989).

Other state courts generally agree with California courts that the sale of legal forms *without* personalized instructions or advice does not constitute the unauthorized practice of law. *See, e.g.*, Oregon State Bar v. Gilchrist, 272 Or. 552, 538 P.2d 913 (1975) (holding

While this arguably all-encompassing and circuitous definition could render any lay practice of law illegal, the California courts have accepted a certain degree of lay involvement. In the few published cases involving the practice of law by lay practitioners, the courts have upheld the performance of clerical services such as furnishing and filling out legal forms.[37] Lay practitioners are not allowed, however, to provide advice or personalized instructions with these forms.[38] Ethics opinions of the California State Bar[39] support the courts' in-

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that merely providing legal forms without offering personal advice or other assistance does not constitute the unauthorized practice of law); Florida Bar v. Stupica, 300 So. 2d. 683 (1974) (publication of a "divorce kit" which included explanations, instructions, and advice regarding the application and use of forms to secure a no-fault dissolution of marriage constituted the unauthorized practice of law). The definition of advice in this context includes a lay practitioner's correction of errors and explanation of which forms are necessary, how to prepare them, and where to file them. *See, e.g.,* State Bar v. Cramer, 399 Mich. 116, 249 N.W.2d 1 (1976) (non-attorney found to be engaging in unauthorized practice of law by advising clients on documents necessary for no-fault divorce, preparing and occasionally filing completed forms with the court, and advising clients as to proper testimony). Courts are divided whether "kits"—legal forms plus detailed instructions—violate the rules. *Compare* New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 695, 234 N.E.2d 459, 459, 287 N.Y.S.2d 422, 423 (1967) (kits do not necessarily violate practice of law rules) *with* Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 228 (1973) (kits violate practice of law rules); Palmer v. Unauthorized Practice Comm. of State Bar, 438 S.W.2d 374 (Tex. 1969) (defendant engaged in the unauthorized practice of law by marketing "will forms" that include explanatory instructions). For a wider coverage of states' unauthorized practice of law regulations, see C. WOLFRAM, *supra* note 1, at 834-46; 7 AM. JUR. 2D *Attorneys at Law* §§ 101-117 (1980 & Supp. 1990); Annotation, *Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law,* 71 A.L.R. 3D 1000 (1976 & Supp. 1989).

37. *See, e.g., In re* Anderson, 79 Bankr. 482 (S.D. Cal. 1987):

> If defendant had only been called upon to perform and had only undertaken to perform the clerical service of filling in the blanks on a particular form in accordance with information furnished him by the parties to the transaction, he would not have been guilty of practicing law without a license.

Id. at 484-85 (quoting People v. Sipper, 61 Cal. App. 2d 844, 846, 142 P.2d 960, 962 (1943)); *see also* Mickel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957) (generally, the practice of law is not involved in the function of a scrivener of legal instruments).

38. *See, e.g., Anderson,* 79 Bankr. at 482-85 (paralegal who interviewed debtor and solicited information, selected and prepared bankruptcy schedules, and advised debtor of legal rights engaged in unauthorized practice of law); People v. Landlords Professional Serv., 178 Cal. App. 3d 68, 69, 223 Cal. Rptr. 483, 483 (1986) (tenant eviction firm violated unauthorized practice of law rules by "conduct[ing] interviews with its clients, elicit[ing] information during the interview, select[ing] and prepar[ing] appropriate forms from the information elicited during the interview . . . [and] counsel[ing] clients concerning the judicial process of eviction"); *Sipper,* 61 Cal. App. 2d Supp. at 846, 142 P.2d at 962 (real estate agent acted outside the scope of scrivener and thus violated unauthorized practice of law rules by advising a couple on which type of document to execute to secure a loan).

39. Opinions of the ethics committees are not binding on Bar members or the courts; the opinions are advisory only. *See* CAL. RULES OF PROFESSIONAL CONDUCT Rule 1-100(A)

terpretations: "'one who fills in the blanks' in standard forms or otherwise performs only clerical work is typically not engaged in the unauthorized practice of law."[40] The ethics opinions draw a very fine line between clerical and legal work, however. If the lay practitioner actually drafts or even selects the correct form to be used, she has engaged in the unauthorized practice of law.[41] This opinion, if adopted by the courts, would render illegal many lay practitioners' activities including work in the areas of divorce, probate, and real estate.[42]

The Bar's prosecutorial discretion traditionally has followed the guidelines set by the California courts. As early as the late 1970s, the California Bar "recognized that a policy of prohibiting pro se services was not likely to succeed in preventing the continual spontaneous appearance of such services."[43] During the period from the late 1970s to the early 1980s, the Bar instead attempted to regulate the unauthorized practice of law by requiring lay practitioners to sign consent forms in which they agreed to limit their practices by only offering scrivener or stenographer services and to furnish a legal warning to all potential customers before payment.[44] According to the former director of the California State Bar's Unauthorized Practice of Law Committee, no complaint was acted on unless a clear showing of public harm could be made.[45] Enforcement was directed against fraudulent or reckless activities resulting in actual harm or a strong likelihood of harm.[46]

Since January 1985, however, the Bar, pending its own development of an effective policy and program, has left the prosecution of the unauthorized practice of law to state prosecutors.[47] This policy

(West 1989); Rules of Procedure of the Standing Committee on Professional Responsibility and Conduct (Mar. 1989), *reprinted in* California Compendium on Professional Responsibility II (A-2) (Apr. 1990) [hereinafter Compendium].

40. San Diego Ethics Opinion 7 (1983), *reprinted in* Compendium, *supra* note 39, at 1.

41. *Id.* (stating that among the acts which constitute the practice of law . . . are the preparation, drafting, selection or determination of the kind of legal document, or giving advice with relation to any legal documents or matters); San Diego Ethics Opinion 12 (1983), *reprinted in* Compendium, *supra* note 39 ("rendering advice or assistance in the selection, preparation and filing of dissolution documents does . . . constitute the unauthorized practice of law").

42. Ethics Opinion 7, *supra* note 40 (stating that a lay practitioner who provided services relating to corporate formation, bankruptcy filing, maintenance and dissolution, and real estate violated the unauthorized practice of law statute); Ethics Opinion 12, *supra* note 41 (stating that a divorce center violated the unauthorized practice of law statute).

43. Michelman, *supra* note 15, at 55 n.189.

44. *Id.*

45. *Id.* at 38 n.135 (citing a July 1982 conversation with R. Burkett, former Unauthorized Practice of Law Director of the Bar).

46. *Id.* at 38.

47. *See* REPORT I, *supra* note 12, at 9; REPORT II, *supra* note 12, at 7.

of non-enforcement by the Bar and the prosecutors' lack of time and funds have left a gap between the law and enforcement.[48] Consequently, lay practitioners are in a state of limbo: the state prosecutors and bar authorities could begin prosecuting, and the courts could begin to condemn, practices that they presently appear to condone.[49]

II. Dissatisfaction with the Present Legal System

Two main criticisms have been leveled at the current structure of the California legal system: lack of access to legal services and lack of public participation in legal structuring decisions. Critics argue that deregulation of the practice of law would best remedy these deficiencies.[50] These critics reject the argument that rules prohibiting the unauthorized practice of law protect the public and the court system, and instead assert that the rules serve mainly to protect lawyers by keeping the supply of legal services low and the cost high.[51]

Inarguably, a large segment of society is being deprived of legal services.[52] Gerry Singsen, former vice president of Legal Services Corporation,[53] estimates that Legal Services and private pro bono satisfy only fifteen percent of the total legal needs of those persons whose income falls below the poverty line.[54] He did not estimate how

48. *See* REPORT I, *supra* note 12, at 7.

49. *See supra* notes 5-7 and accompanying text.

50. *See supra* note 1.

51. *See supra* note 9.

52. Chalfie, *Break the Lawyer's Legal Advice Monopoly,* Newsday, Dec. 3, 1989, at 4 (One recent study shows eight out of 10 low-income Illinois residents are unable to get legal help with civil problems when needed; moreover, nearly 130 million people are "shut out of America's legal system because lawyers cost too much." Another study shows that New York's poor face nearly three million legal problems per year without legal help).

53. Legal Services Corporation was created by the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 388 (codified at 42 U.S.C. §§ 2996-2996l (1982)), with a mandate "to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and "to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel." Legal Services Corporation gives funds to private legal services programs throughout the country who then provide legal assistance in civil matters to the poor. 1987-1988 LEGAL SERVICES CORPORATION FACT BOOK ix (1989).

54. Miskiewicz, *Volunteerism Alone Not Enough: Mandatory Pro Bono Won't Disappear,* Nat'l L.J., Mar. 23, 1987, at 1. A nationwide study sponsored by the ABA determined that in 1987 there were approximately 4.9 million civil legal problems for which low income households (those at or below 125% of federal poverty guidelines) had legal assistance and approximately 19 million civil legal problems for which there was no legal help—a ratio of about one to four. 1989 PILOT ASSESSMENT OF THE UNMET LEGAL NEEDS OF THE POOR AND THE PUBLIC GENERALLY, A.B.A. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC 37-38 (May 1989) *reprinted in* REPORT II, *supra* note 12, at Supp. Appendix 14 [hereinafter ABA

the remaining eighty-five percent solve their legal problems. Part of this unmet need is caused by the defunding of Legal Services during the 1980s.[55] From 1981 to 1990 low income discretionary program funding, which finances Legal Services, was decreased by 30.7 percent after accounting for inflation.[56]

Lack of access to legal assistance burdens more than the poor. One study showed that middle America—those above the lowest twenty percent of the income levels and below the highest ten percent of the income levels—was not receiving or using legal services when these services would have been "highly useful or appropriate."[57] A

STUDY].

A state-wide study conducted in Illinois in 1989 reported the same ratio—80% of the civil legal needs of the poor go unmet—among the poor in Illinois. ILLINOIS LEGAL NEEDS STUDY 2 (1990) *reprinted in* REPORT II, *supra* note 12, at Supp. Appendix 15 at 2. The study cited the "[d]rastic reductions in funding from the federal Legal Services Corporation" as a factor. *Id.*

In New York the lack of legal services is even more pressing. A 1987 study found that only approximately 14% of the New York poor in need of civil legal services have their needs met. NEW YORK LEGAL NEEDS STUDY DRAFT FINAL REPORT 197-98 (Oct. 11, 1989) *reprinted in* REPORT II, *supra* note 12, at Supp. Appendix 17.

See also SPECIAL COMM. ON PREPAID LEGAL SERVICES, A.B.A., COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES 7 (1974) (setting forth a number of studies and surveys on the need for and usage of legal services conducted between 1950 and 1980).

Although outside the scope of this Note, see Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel,* 13 HASTINGS CONST. L.Q. 625 (1986), for an account of the various studies performed on the lack of funding of indigent defense and criminal services.

55. Private legal services foundations receive other sources of funds, but Legal Services Corporation is the chief provider. In 1988, Legal Services Corporation provided $295,340,727 (approximately 69% of the total funds); other federal sources (grants from Title XX of the Social Security Act and the Older Americans Act) provided $27,678,482 (approximately 8%; private contributions (United Way, Interest on Lawyers Trust Account, bar associations) provided $67,785,000 (approximately 1.6%); and state and local governments provided $33,755,000. 1988-1989 LEGAL SERVICES CORPORATION FACT BOOK 20-26 (1990). To put a proper perspective on these nationwide figures, note that California's share of the above sums amounts to funding of $9.67 per poor person in California (using a poverty rate of 100% of the federal poverty rate). *Id.* at 21.

56. Center on Budget and Policy Priorities, Robert Greenstein, Director, Table 2 (Dec. 26, 1989). The decrease is calculated using the GNP deflator with inflation set at 4.4%.

In general, the American public has not approved of these decreases in spending for Legal Services and other legal public assistance programs. An April, 1981 CBS-New York Times poll conducted before the funding decreases of the 1980s indicated that 83% of those polled supported the same level or an increased level of funding for legal assistance; only 13% favored a decrease in spending. R. BROWNSTEIN & N. EASTON, REAGAN'S RULING CLASS 429 (1982).

57. Meserve, *Our Forgotten Client: The Average American,* 57 A.B.A. J. 1092, 1093 (1971). *See* B. CHRISTENSEN, *supra* note 15, at 26. Christensen observes:

> Although the number of law graduates seems to be increasing, the supply of lawyers expected to be available in the immediate future may well be inadequate to handle even a slight over-all increase in the middle-class public's use of lawyers'

study commissioned by the Legal Aid Society of Orange County, California, confirmed that a legal services gap exists between those above the federal poverty guidelines and those able to afford a lawyer.[58]

The public not only lacks sufficient affordable legal services, but also an adequate say in how legal services are regulated. Although the American Bar Association and the California Bar recognize that the profession's unique powers of self-government place a burden on the various state bars to ensure their actions are conducted for the public's benefit,[59] they traditionally have defined the public's legal needs without the public's input.[60] One commentator argues that "by design or neglect, the organized bar has settled on an approach involving low-visibility enforcement efforts by state and local unauthorized practice committees, attended by as little public discussion as possible."[61] Undeniably, a large portion of the public believes that

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services, just as it seems already to be inadequate to supply the demand being uncovered by the legal services program for the poor.

Possible answers to why these groups are not using legal services include the actual and sometimes over-exaggerated fear of the high costs of legal help and even the fear of lawyers and legal processes themselves. *See infra* notes 157-59 and accompanying text.

58. The study found that of those persons referred by the Orange County Legal Aid Society to private attorneys because the applicants made too much money, 87.2% could not afford the fees or the fees would be higher than the financial reward from the case. Nearly 70% of those persons had jobs. Saari, *Study: Legal Aid Aids Few*, Orange County Register, June 7, 1990, at 1, col. 3.

59. The Preamble to the MODEL RULES OF PROFESSIONAL CONDUCT (1983) states that:

> [A]lthough other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. . . . [This] relative autonomy carries with it special responsibilities . . . . [The Bar] must assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the [B]ar.

It would be virtually impossible, however, to eradicate *all* action based on self-interest. If one considers legal work a "public good," furthering lawyers' interests furthers society's interests to some extent. Of course we do not live in a perfect society in which all intents held and work accomplished by lawyers are both legally and morally correct. Thus, there is the need for some form of strict scrutiny of lawyers' actions.

60. For example, although the California State Bar Board of Governors, the governing authority of the Bar, CAL. BUS. & PROF. CODE §§ 6008.4, 6010 (West 1990), was created in 1927, *see id.* § 6010 (history and statutory notes), it was not until 1975 that members of the public were allowed to serve on the Board. *Id.* § 6013.5. But see *infra* notes 133-138 and accompanying text for an account of the Bar's increased public accountability and *infra* note 113 for the Bar's recognition of the unmet need for access to legal services.

61. Rhode, *supra* note 1, at 4. Her survey vividly supports this: information was kept by the unauthorized practice of law committees in only about half (22 of 45) of the jurisdictions she surveyed, and information was published in only about one-fourth (12 of 45). *Id.* at 21. California data reflect a similarly low visibility enforcement process: of the 1450 inquiries and complaints against lay practitioners received by California Bar officials

the freedom to choose whether to use an expensive lawyer or cheaper lay practitioner must belong to the public.

Commentators argue that this perception of impotence robs the public of personal autonomy.[62] Rhode emphasizes the rights of self-representation and freedom of speech, focusing on their expressive, educational, and political significances.[63] She cites, as an example of the use of lay legal services to effectuate social and political reform, feminists who have developed divorce kits and clinics to promote competence and independence in women.[64] By proceeding pro se, the argument goes, women do not need to rely on a traditionally male-dominated profession.

Proponents of deregulation argue that deregulation would solve the problems of the lack of access to and control over legal services by increasing the supply and decreasing the cost of legal services. One typical free-market advocate explains, "[A] freely competitive market would bring down fees, increase consumer choice and better protect clients than does today's closed monopolistic guild."[65]

The advocates of deregulation argue that the distinction between clerical services, already accepted by the courts, and personalized instructions and advice is not rational. The main thrust of the deregulation argument is that there is no clear proof that the practice of law by lay practitioners harms society.[66] Rhode conducted a survey

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from consumers in 1979, only 42 (3%) were directed to law enforcement agencies. *Id.* at 28 (taken from Interview with Director, California Unauthorized Practice Dept., Oct. 1980).

As a point of reference, the Bar received 6946 complaints about lawyers in 1981; 938 complaints were investigated (13.5%). News Background, *supra* note 19, at 9. Of these, 70 resulted in reprovals, 92 in suspensions and disbarments, and 113 in admonitions or warnings. *Id.*

62. B. CHRISTENSEN, *supra* note 1, at 201-04; *See* C. WOLFRAM, *supra* note 1, at 857. One may suspect that Christensen's and Wolfram's clamor for freedom of choice actually masks a dislike of government regulation. Christensen refers to George Orwell's 1984 and asserts, "Citizens are everywhere hemmed in by rules, regulations, restrictions, and restraints that have been imposed upon them by officious, often self-anointed, and usually arrogant guardians, both governmental and private, who have undertaken to do their thinking for them." B. CHRISTENSEN, *supra* note 1, at 202; *see* C. WOLFRAM, *supra* note 1, at 856-57 (suggesting his antipathy towards government regulation).

Another commentator argues that Christensen's deference to the public interest in freedom of choice is "not necessarily realistic where individuals at middle and lower income levels not uncommonly become involved in complex transactions with private entities or confrontations with bureaucracies. . . . [S]ociety also has an interest in seeing that decisions affecting legal rights are made efficiently, and in a responsible and fully informed manner." Michelman, *supra* note 15, at 21 n.75.

63. Rhode, *supra* note 1, at 70-73.

64. *Id.* at 72 (referring to Jacobs, *The Wave Project,* in THE PEOPLE'S LAW REVIEW 153, 157-58 (R. Warner ed. 1980)). *Cf.* Michelman, *supra* note 15, at 25-31 (arguing that first amendment interests rarely are implicated by lay practitioner advertising).

65. Bandow, *supra* note 2, at 2, col. 3.

66. *See e.g.,* Christensen, *supra* note 1, at 203 ("there is comparatively little in the

of state officials patrolling the unauthorized practice of law in forty-five jurisdictions, including California.[67] She found that the committees regulating the unauthorized practice of law processed only 2,669 inquiries, complaints, and investigations in 1979.[68] Surprisingly, a mere thirty-nine percent of the committees and bars surveyed reported any direct consumer complaints (as opposed to complaints filed by lawyers, judges, or other third parties) and only twenty-one percent indicated that these complaints had alleged specific injury.[69]

The proponents of deregulation further argue that many of the legal areas in which lay practitioners operate or would operate if allowed are not taught adequately in law schools.[70] In fact, lawyers often shunt these types of legal problems to secretaries or paralegals and never review the results.[71] A Connecticut study of uncontested divorces indicated that pro se litigants did about as well as lawyers in form preparation and court proceedings.[72] In some areas such as timeliness of filing papers, the pro se litigants actually did better than the lawyers.[73] Therefore, advocates of deregulation argue, cheaper lay practitioners would provide much-needed competition for law-

history of unauthorized practice, either in the literature or in the cases, by way of hard evidence of substantial actual injury to the public through the activity of unauthorized practitioners").

67. Rhode, *supra* note 1, at 14. Her survey excludes Connecticut, Washington, Pennsylvania, and seven other states that are not active in unauthorized practice of law regulation: Alaska, Kansas, Maine, Massachusetts, Minnesota, Mississippi, and Vermont. *Id.* at 14-15. See *infra* notes 167-177 and accompanying text for a criticism of this survey.

68. *Id.* at 22-23. California alone accounted for 54% of the 2699 inquiries, investigations, and complaints. *Id.* at 22, 43. *See also* News Background, *supra* note 19, at 8 (the California Unauthorized Practice of Law Committee receives over 1000 unauthorized practice of law complaints each year).

69. Rhode, *supra* note 1, at 33. Notably the data from California, which accounted for over half of the total injuries, and three other states was excluded because exact data was unavailable. *Id.* at 33 n.89. Rhode does add in a footnote that the then director of California's Department of Unauthorized Practice, "during the course of a single interview, . . . variously estimated that one-third, two-fifths, and one-half" of the complaints involved consumer injury. *Id.* at 33 n.87.

70. *Id.* at 86. "[I]t is not self-evident that professional certification or supervision insures special competence. Few, if any, accredited law schools or bar examinations require facility in completing the documents required for uncontested divorces or real estate transactions." Curiously, Rhode does not use the above observation to argue that a better system for training lawyers should be developed, but rather to argue that lay practitioners need not be competently trained either.

71. *Id.* at 87.

72. Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis,* 86 YALE L.J. 104, 123-29 (1976).

73. *Id.* at 126. The Commission on Legal Technicians, *see supra* note 12, also conducted a survey of client satisfaction and found that only 64% of those respondents who used lawyers were happy with the overall service, while 76% of those who used other providers were happy. REPORT II, *supra* note 12, at 14.

yers, which would encourage lawyers to increase their own level of competence.[74]

III. Proposal by the California Public Protection Committee

The complaints of lack of accessibility to legal services, little accountability to the public, and unjustifiable lawyer monopoly of legal services stirred the California Bar into action in 1988. The Bar formed the Public Protection Committee to examine the rules regarding the unauthorized practice of law and to consider the possibility of deregulation.

To ensure public involvement, the Bar invited a wide cross-section of the public to serve on the Committee.[75] The Bar's Board of Governors ultimately chose eight people: four lawyers[76] and four non-lawyers.[77] The Board charged the Committee to investigate six specific issues: whether public harm is likely to occur from the lay practice of law; whether the harm warrants regulation; what form the regulation should take; who should be in charge of the regulation; who should pay for the regulation; and what might be an appropriate time-table for consideration of these issues.[78] This Part sketches the Committee's investigatory activities and findings and concludes with its final proposal.

74. B. CHRISTENSEN, *supra* note 15, at 215-16.

75. REPORT I, *supra* note 12, at 2. The Bar's Board Committee on Professional Standards invited legal professionals (attorneys, legal academics, and retired judges); non-legal professionals (real estate brokers, bankers, certified public accountants, title company employees, insurance professionals, and public notaries); members of paralegal associations; members of tenant and landlord associations; representatives of consumer protection agencies; people involved in legal service programs; and people involved in local law enforcement.

76. Joseph R. Austin, Chair (business trial lawyer with the Los Angeles firm Tuttle & Taylor), *id.* at 2, 16; Stephen R. Elias (Nolo Press writer and editor, teacher of legal research to non-lawyers and legal research and advocacy to paralegals, and author and co-author of books on subjects such as do-it-yourself contracts and wills), *id.* at 2, 22-24; Aggie R. Hoffman (immigration and nationality law specialist, prior chair of American Immigration Lawyers Association Unauthorized Practice of Law Committee), *id.* at 2, 26; Stephen E. Taylor (Deputy District Attorney for San Joaquin County in charge of the District Attorney's Consumer and Business Affairs division), *id.* at 2, 31.

77. Victor Salazar, Vice Chair (consumer protection professional, member of California Consumer Affairs Association, member of Legal Services Trust Fund Commission of the State Bar of California), *id.* at 2, 28-30; Fran Chernowsky (self-employed paralegal who provides services exclusively to lawyers, former President of the Los Angeles Paralegal Association in 1985 and 1986), *id.* at 2, 18-21; Tim Pluma (self-employed paralegal who provides services exclusively to lawyers, President of Paralegal-Plus Placement Service, former President of Los Angeles Paralegal Association in 1987), *id.* at 2, 27; Michael D. West (self-employed mediator and arbitrator), *id.* at 32.

78. *Id.* at 2.

A. Activities of the Committee

The Committee engaged in three information-gathering activities: its own investigation and research,[79] public hearings,[80] and surveys of California consumer protection agencies[81] and state bars.[82] Press releases were circulated before each hearing,[83] and the Committee sent invitations offering individuals and organizations the opportunity to appear at the hearings or submit written comment.[84] The questionnaires were sent to the consumer protection agencies to determine the extent and location of harm arising from the lay practice of law and how these agencies processed complaints.[85] The questionnaires sent to the state bars solicited information with regard to their regulation and definition of the practice of law and asked whether they had studied the impact of lay practitioners offering legal services.[86]

B. Results of the Investigation, Public Hearings, and Surveys

In contrast to Rhode's survey,[87] the Committee found that "there is significant potential for public harm caused by the activities of

79. For a partial bibliography of the law review entries, cases, statutes, and rules reviewed by the Committee, see *id.* at 42-47.

80. Three hearings were conducted: one in Los Angeles on June 16, 1987, one in San Francisco on September 15, 1987, and one in Fresno on October 8, 1987. *Id.* at 3.

81. Surveys were sent to 126 California consumer protection agencies, including the consumer protection division of each local and statewide district attorney's office in California. *Id.* at 4-5.

82. The state bars included voluntary and integrated bar associations where appropriate, the Bar of the District of Columbia, and the Bar of Puerto Rico. *Id.* at 5.

83. The releases were sent to 150 daily newspapers, 50 legal dailies, and 30 minority papers. In Los Angeles, Spanish translations were distributed. The first release also was forwarded to 260 bar leaders. *Id.* at 3.

84. Over 600 invitations were sent to various parties, including all California law schools, law libraries, bankruptcy judges listed in the PARKER DICTIONARY OF CALIFORNIA ATTORNEYS (1987), all paralegal training institutions according to a listing provided by the Los Angeles Paralegal Association, legal aid foundations, and government entities (listed by the Office of the Attorney General, *Cal. Consumer Protection Agencies Directory* (Apr. 1987)). *Id.* at 3, 4. The meeting in Los Angeles had 34 speakers; San Francisco had 24 speakers; and Fresno had 28 speakers. *Id.* at 3. The Committee received 74 written comments. *Id.* at 3-4. A total of more than 770 pages of reporters' transcripts was made, creating an approximately 1500-page record. *Id.*

85. *Id.* at 4, 39.

86. *Id.* at 5, 40-41.

87. *See supra* notes 67-69 and accompanying text.

legal technicians."[88] They determined that the primary risks of harm from legal technicians are consumer fraud from false and misleading advertising, false representation and promises, and intentional failures to perform.[89] Negligence was determined to be of secondary, but nonetheless significant, importance.[90] The Committee found that "[e]ither because of the demand or the current structure of the marketplace, unscrupulous services most frequently appeal to individuals when they are most vulnerable and offer services that could cause far-reaching, and often disastrous, consequences if not performed in a timely and correct manner."[91]

The Committee found that although the fear of prosecution causes some practitioners to limit the scope of their activities,[92] the current enforcement mechanisms[93] generally provide "inadequate protection against the risk of public harm."[94] The Committee stressed its belief that the inherent vagueness of the term "practice of law" renders enforcement difficult.[95]

After noting these harms, the Committee apparently balanced the positive findings against the negative and concluded that "the

88. REPORT I, *supra* note 12, at 7. The Committee used the term "legal technician" throughout its report to designate "a non-lawyer who provides law-related services to members of the public." *Id.* at 1 n.1. The Committee distinguished legal technicians from "dependant paralegals," defined by the Committee as direct employees of individual lawyers and law firms or indirect contractors who contract to do work solely for lawyers and law firms. Because dependent paralegals do not provide services directly to the public, the Committee determined that no risk of harm results from their activities. This group thus was excluded from the Committee's report. *Id.* at 7.

89. *Id.* at 8. The Committee did find, however, a "number of highly qualified and dedicated legal technicians who deliver valuable assistance to individuals for fair consideration." *Id.* at 7.

90. *Id.* at 8.

91. *Id.* at 7. The Committee especially noted abuses by notary and immigration consultation services: "In many countries worldwide, only licensed lawyers may serve as notaries and, in many other countries, appointment to the position of 'notary' designates the elevated status of a lawyer." *Id.* at 8. Furthermore, because many of the immigrants and less-knowledgeable segments of the population who rely on U.S. notaries cannot speak English and are in the country illegally, they are even more susceptible to abuse. *Id.* at 33. Their vulnerability to deportation magnifies the consequences of fraud or incompetence. *Id.* The Committee thus concluded that "[s]ome further regulation of notaries is required to help alleviate the deceptive practices of some notaries." *Id.* at 8.

92. *Id.*

93. *See supra* Part I B.

94. REPORT I, *supra* note 12, at 7.

95. [T]he activities of many legal technicians could arguably be called the practice of law. The problem is that, in our law-dominated society, many fairly common activities fall within the traditional definition of what constitutes the practice of law. Thus when the State Bar's "treaties" that permitted certain other professionals to practice law with impunity were invalidated, the concept of unauthorized practice became incapable of meaningful definition and therefore unenforceable.

Id. at 8-9. See C. WOLFRAM, *supra* note 1, at 826 for an explanation of these treaties.

overwhelming need to provide better access to legal services justifies some risk of individual harm."[96] The Committee found the need for increased access most compelling at the "lower-to-mid levels" of the legal processes, defined as landlord-tenant, immigration, family law, and bankruptcy, areas in which lawyers inexplicably could not or would not provide proper services.[97]

C. The Committee's Recommendations

The Committee's recommendations centered on three main provisions: replacing the rules regulating the unauthorized practice of law with rules solely precluding the use of the title "lawyer," requiring registration of lay practitioners, and providing certain civil and criminal penalties for violation of these rules.[98]

(1) Abolishing the Unauthorized Practice of Law Rules

The Committee strictly rejected licensing and other "bureaucracy-laden" regulation on the assumption that such regulation would simply restrict competition rather than protect consumers.[99] It also determined it would be "impossible to fashion [a licensing system] wisely . . . in advance given the large number of different activities that would be subject to it."[100] Instead, the Committee proposed replacing traditional prohibitions on the lay practice of law with legislation that simply would make it a misdemeanor for anyone who is not an active member of the California Bar to claim to be an attorney.

(2) Registration and Disclosure

To practice law in the quasi-deregulated environment envisioned by the Committee, a lay person simply would register as a "legal technician"[101] and pay a filing fee. Curiously, to define the term "legal technician," the Committee was forced to do what it asserted it could

96. Report I, *supra* note 12, at 7.
97. *Id.*
98. See *id.* at 9-13 for the exact language of the Committee's proposals.
99. *Id.* at 10.
100. *Id.*
101. See *supra* note 88 for the exact definition of a "legal technician."

not do earlier, namely to define "the practice of law."[102] The legal technician then would be able to offer her services for *any* legal matter, excluding actual in-court representation.[103] These services presumably could range from the relatively simple filing of an uncontested divorce action to the investigation and preparation of a criminal charge of murder (excluding the actual in-court representation). The practitioner's only duty beyond registration would be to obtain a written waiver from her client attesting that the client understands that the practitioner is not an attorney.[104] In the absence of such a written waiver, the courts would presume that the technician represented herself as an attorney.[105]

(3) Remedies

The Committee's proposal provides civil remedies including reasonable attorney's fees and court costs to the prevailing party for harm resulting from a technician's negligence.[106] If, in conjunction with this harm, the technician is found to have misrepresented herself as an attorney, the court would award treble damages to the injured client.[107] The proposal also provides injunctive relief and civil penalties for registration violations, diversion of funds under $1,000, and withholding of client documents.[108] Lastly, the proposal provides criminal penalties for the intentional diversion of client funds of over $1,000.[109]

The Committee concluded that "at present in California there is no adequate regulatory model and no agency staffed to assume management of a regulatory scheme if adopted."[110] The Committee did not specify an agency to organize and manage the registration, but did assert that the Bar should not be directly involved because

102. This ability of the Committee to define the practice of law removes one asserted argument for deregulation, namely that the "practice of law" is undefinable and thus not possible to regulate. *See supra* text accompanying note 95. The true issue becomes not the inability to define the practice of the law, but the appropriateness or fairness of allowing one group, namely members of the California Bar, to control such a large block of activities. *See supra* notes 59-65, *infra* notes 131-132 and accompanying text.

103. REPORT I, *supra* note 12, at 10.

104. *Id.* at 11.

105. *Id.* The Committee did not specify if and how the legal technician might rebut this presumption.

106. *Id.* at 12-13.

107. *Id.* at 12.

108. *Id.* at 12-13.

109. *Id.* at 12.

110. *Id.* at 5. The Committee also noted that public prosecutors normally have the resources and energies to deal with only the major frauds of legal technicians. *Id.* at 7.

it "would be a serious political and public relations mistake."[111]

D. The California Bar's Response to the Committee's Report and its Present Status

The Bar has authorized the release of the Committee's report but has not approved its contents.[112] The Bar has accepted the proposition that lay practitioners may be able to satisfy some of the need for legal aid,[113] but it is not ready to accept the view that the benefits of full deregulation would outweigh the costs.[114] The Bar instead created a ten-member commission,[115] the Commission on Legal Technicians (Commission), to study the fine-tuning of the Committee's proposal. The Commission has the duty to determine guidelines for practice by lay practitioners that will best protect the public, including standards for training, licensing, and regulation; the entity that should be responsible for their regulation; and the areas of practice and scope of tasks that they may perform.[116] Notably, the Commission comprises a more diverse group of people than those who served on the Committee:[117] three lawyers, two members of the judiciary, two nonlawyer providers of law-related services, two consumer representatives, and one representative from the Department of Consumer Affairs.[118] The Commission was given until July 1, 1990, to complete its study.[119]

111. *Id.* at 8. The Committee determined that the Bar's involvement would be viewed as self-interested and "[s]ince we find that most lawyers are not providing legal services in these areas . . . [there would be no corresponding] economic benefit to members of the State Bar." *Id.*

112. CALIFORNIA STATE BAR, Public Release Letter (1989) [hereinafter Letter] (available at the California State Bar). The Bar also sought public comment on the report. Two hearings, one in San Francisco on January 19, 1989, and one in Los Angeles on January 26, 1989, sought written or spoken comment on the Committee's report and alternative solutions. *Id.* at 3.

113. The Bar resolved that "there is an overwhelming unmet need of California residents for better access to the legal process, and that 'legal technicians' may provide greater access so long as their activities do not pose an unreasonable risk of harm to the public." BOARD OF GOVERNORS, STATE BAR OF CAL., Resolution (Aug. 26, 1989) [hereinafter Resolution].

114. Letter, *supra* note 112. Outgoing Bar President Colin Wied warned that opening the practice of law to lay practitioners could endanger the quality of legal services given to the public. Reuter Libr. Rep., Aug. 26, 1989, at 1. Present Bar President P. Terry Anderlini complained that "my 6-year-old son could register and offer you legal advice." Nat'l L.J., May 16, 1988, at 6, col. 1.

115. Resolution, *supra* note 113.

116. *Id.*

117. *See supra* notes 75-77 and accompanying text.

118. *Id.*

119. Hall, *supra* note 7, at 1, col. 4.

The Commission released its report[120] to the public on August 30, 1990.[121] In summary, the Commission advocated allowing lay practitioners, labeled "independent paralegals," to engage in the practice of law only in the fields of bankruptcy, family law, and landlord-tenant law. Other areas could be opened up eventually.[122] These independent paralegals would be under the supervision and administration of the Director of the Department of Consumer Affairs, subject to oversight by the California Supreme Court, which has final authority to approve any rules and regulations of the independent paralegals.[123]

The report is being circulated for public comment for ninety days, which will lapse on November 28, 1990.[124] The Bar has not yet approved the Commission's proposal.[125] If the Bar decides to approve the proposal, it then would be up to the California legislature and the California Supreme Court to redefine the present laws and court rules that regulate the practice of law.[126] The legislature also would have to give the Department of Consumer Affairs the power to supervise and administer the system.

The Bar is not required to approve either the Committee's proposal or the Commission's proposal. If the Bar decides to choose between the two, however, it undoubtedly will approve the less-radical Commission's proposal. Probably foreseeing this, two California senators have sponsored identical bills that essentially mirror the Committee's proposal.[127]

The next Part analyzes how deregulation would affect the legal system, using the Committee's proposal as a basis of critique.[128] Taking into account the deficiencies in the deregulation proposal, this Note then counters with a proposal that will satisfy the opposing factions—the Bar and the deregulation proponents—while still protecting the public and the judicial system.

120. REPORT II, *supra* note 12.

121. News Release (Aug. 30, 1990) [hereinafter News Release] (available at the California State Bar Office of Professional Conduct).

122. REPORT II, *supra* note 12, at 1, 26.

123. *Id.* at 27.

124. News Release, *supra* note 121.

125. *Id.*

126. These include sections 6125-6127 of the State Bar Act and California Rules of Professional Conduct 1-300, 1-310, and 1-320, pursuant to sections 6076-6077 of the State Bar Act.

127. *See supra* note 12.

128. The bulk of this Note, including its proposal, was developed before the Commission issued its report. In addition, the Committee's report provides a clearer, more extreme contrast to analyze the utility of varying degrees of deregulation than does the Commission's more tempered approach.

IV. A Critical Look at the Committee's Proposal to Deregulate

The Committee's inclusion of the public in the creation of its proposal is commendable. The composition of the Committee, the public hearings, and the disclosure to the public during all phases of the Committee's decision-making activities showed that both the Committee and the Bar finally recognize that the interests of the public and of the legal profession do not always coincide.

The Committee's proposal, unlike pure deregulation, calls for some prophylactic measures such as registration and waiver disclosure, as well as remedial measures including civil and criminal liability. Because the Committee underestimates the dangers of deregulation and overestimates the benefits of deregulation, however, these prophylactic and remedial measures are not strong enough. Specifically, the Committee overemphasizes and overestimates the Bar's monopoly power; idealistically assumes the market runs efficiently, allowing persons to retrieve and utilize necessary information; underemphasizes the need for a certain level of legal competence; and fails to recognize the possible negative impact deregulation may have on indigents.[129]

A. The Competing Interests at Stake: The Extent and Effects of the Bar's "Monopoly" Control of the Legal Profession

Recognition of the crucial balance of power at issue is the first step in analyzing the Committee's deregulation proposal. Desires of the legal profession aside, the problem can be viewed from two vantage points: that of the "would-be providers"—lay practitioners who desire to break into the legitimate legal market, and that of the consumers—clients who desire to have access to legal services. The Committee may have been overly swayed by the former group to the detriment of the latter. Although the desires of the lay practitioners are valid considerations,[130] it would be fruitless to replace one self-interested regulatory system with another.[131]

129. The Committee's report lacks full explanations for many of its recommendations; this Note therefore, hypothesizes at times on the underlying reasons behind the recommendations.

130. This will be true not only because the occupational desires of lay practitioners are valid concerns in framing legislation, but also because the voiced complaints of this group

The deregulation movement also should not be motivated by a desire to deregulate the legal market solely to wrench control of the legal field from the Bar. Many commentators have focused myopically on the power the various state bars have on legal regulation and have over-estimated the effect of this power.[132] The Bar's "monopoly" power actually has decreased.[133] Furthermore, the "Bar" is

affect the rest of society's view of the law. This is an important consideration because the belief in the *processes* of law affect the public's respect of the *substance* of the law itself.

131. The Board of Governors, in selecting the Committee's composition, arguably over-represented the lay practitioners' interests. One-half of the Committee could be viewed as having an interest in the outcome: Ms. Chernowsky (paralegal associations), Mr. Elias (Nolo Press affiliations), Mr. Pluma (paralegal associations), and Mr. West (arbitration and mediation). *See supra* notes 76-77. Three of the rest of the group could be viewed as having an interest in maintaining the status quo: Mr. Austin (attorney), Mr. Hoffman (lawyer affiliations), and Mr. Taylor (attorney). The final member, Ms. Salazar, represented consumer protection interests and appears to have no professional interest. *Id.* By contrast, the Commission members include two "non-lawyer providers of law-related services" and two "representatives of consumers." *See supra* notes 117-118 and accompanying text. This is a better balancing of interests.

The fact that other professional groups operate freely seemed to weigh heavily in the Committee's decision: "We find this threat of prosecution for unauthorized practice of law unjustified, particularly in light of the virtually innumerable other services (real estate brokers, title companies, accountants, bankers, tax preparers, to identify only a few) that operate seemingly without risk of prosecution." REPORT I, *supra* note 12, at 8. This accentuates the view of deregulation as a struggle for market control, rather than an altruistic fight for the public's benefit.

132. [W]here [legal] professional actions can be attributed to more benign or malevolent motivations, the latter seem always to be preferred. Higher educational standards may have had a salutary effect on quality of care and on research and the advancement of professional knowledge; professional ethics may have produced higher levels of professional responsibility; and licensure may have protected the gullible from exploitation and personal tragedy. That some of those aspects of professionalism have also had monopolistic effects seems to have largely eclipsed any beneficial consequences. Even if actions are not explicitly monopolistic, that can be reinterpreted as strategic retreat or cunning strategy.

T. HALLIDAY, BEYOND MONOPOLY 350 (1987).

133. *Id.* at 351-52 (asserting that there has been a voluntary "'professional divestiture' of some traditional functions thought to be core elements of monopoly" of the practice of law such as advertising and disciplinary activities, and an involuntary loss of monopoly controls through court decisions such as those striking down minimum fee schedules); Michelman, *supra* note 15, at 13 (asserting that "increased external control of the legal profession by government agencies, clients, and the press has decidedly chilled the potentially anticompetitive policies of the organized bar in the last two decades") (quoting from Remarks of Michael Powell, Research Social Scientist, The American Bar Foundation, "The Organization of the Profession," at the ABA Midyear Meeting, Jan. 1982); *see* M. Powell, "Developments in the Regulation of Lawyers: Intra and Extra Professional Controls" (paper presented at the Annual Meeting of the American Sociological Association, Toronto, Aug. 1981) (on file, ABA Center for Professional Responsibility Brief Bank)). Eugene Thomas, former president of the ABA, vehemently argues against the assertion that lawyers engage in the monopolistic practice of price-fixing:

[T]he American Bar Association code of ethical conduct holds excessive fees to

not one cohesive group; factions often may compete with each other, limiting monopoly power.[134] The California Bar presently comprises almost 93,000 members;[135] a group this large cannot always act with a unified voice.

Presently, the public actually does have some degree of internal control over the California Bar. California law mandates that over one-fourth of the Bar's Board of Governors be comprised of public members who have never been members of any state's bar.[136] Nine of the Bar's nineteen-member examining committee, which examines Bar applicants and administers requirements for admission, must not be members of the Bar.[137] California law further requires that the three-member review department, which reviews decisions of the Bar's examining committee, contain one non-lawyer.[138]

Furthermore, the effect of the power that the Bar does hold is not always harmful. Consolidation of control and the resulting economies of scale help enable the Bar to be an effective liaison between individuals and the state.[139] The Bar's regulation of the legal profession also gives the state the freedom to spend its limited resources elsewhere.[140]

Although consideration of the Bar's control naturally may enter into the decision whether to abolish the restrictions against the lay practice of law, it should not be the sole factor. Rather, the focus should be on the needs of the public. These needs can be divided into two areas: the need for increased access to adequate legal services at affordable costs; and the need for some individual autonomy—the ability to choose when to use and when not to use a lawyer. Before

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> be unethical, and lawyers who collect them are subject to discipline. The profession thus protects the public from unreasonable charges, and that is only possible under a system policed by the courts and the bar. Consider that there never have been price-fixing antitrust cases of any significance against lawyers. If there had been "blatant price-fixing," the courts would have been full of such cases.

Thomas, *The Hidden Agenda of the Radical Right,* N.Y. Times, Mar. 15, 1987, at 2, col. 6 (city ed.).

134. T. HALLIDAY, *supra* note 132, at 309, 350; B. CHRISTENSEN, *supra* note 15, at 5-7.

135. THE LAWYER'S ALMANAC 1990 at 163. These figures were effective December 1988 and January 1989. *Id.* at 164.

136. CAL. BUS. & PROF. CODE §§ 6011, 6013.5 (West 1990). Six of the 22 board members are non-lawyers, appointed for three-year terms each. *Id.*

137. *Id.* § 6046.

138. *Id.* § 6086.65.

139. T. HALLIDAY, *supra* note 132, at 362. Bar associations are "critically placed to bring their monopolies of competence to the reform of constitutional controls over government" and "can contribute to the redistribution of powers among branches of government." *Id.* at 361-62.

140. *Id.* at 367-68.

any deregulation may be considered, the benefit to the public of abolishing the restrictions against the lay practice of law must outweigh the costs.

B. Market Complexities that Render the Practice of Law Unsuitable for a Free Market System

The Committee determined that the benefits of a combined malpractice and registration system outweigh the dangers of consumer harm. The Committee, however, overestimates the benefits of deregulation. The price differential between lay practitioners and attorneys for a particular level of quality and quantity of service actually may not be significant, and the free market's emphasis on cost alone may result in lower quality legal services. The Committee also underestimates the harms of deregulation. Specifically, informational problems may render the poor unable to judge effectively between lay competence and incompetence.

(1) Barriers to Entry in California and the Resulting Effect on Price

The Committee's proposal appears to be based on the idea that deregulation will create a utopian market of increased supply and lower price in which information on legal services is given freely and correctly. Presently, there is a significant differential between the fees charged by lay practitioners and those charged by "discount" law firms located in San Francisco; typically, lawyers charge two to three times more than lay practitioners.[141] This price differential may be

141. In the San Francisco area prices for preparing uncontested divorce forms range from $45 to $245 (excluding court fees). Telephone interview with anonymous receptionist at American Legal Centers, Inc. in Martinez (Jan. 31, 1990); telephone interview with anonymous receptionist at Discount Divorce Service in San Francisco (Jan. 31, 1990); telephone interview with anonymous receptionist at Divorce Center of California (Jan. 31, 1990). The "average" price for discount law firms was approximately $700 (excluding court fees) (based on a $20 to $25 initial fee and a $100 to $150 per hour charge). Telephone interview with anonymous receptionist at the Attorney Referral Service of the Bar Ass'n of San Francisco (Feb. 1, 1990); telephone interview with anonymous receptionist at Hyatt Legal Services in San Francisco (Feb. 1, 1990); telephone interview with anonymous receptionist at Jacoby & Myers in San Francisco (Feb. 1, 1990).

The Commission's study supports these fee differentials. The Commission sent out surveys to various California courthouses that were distributed or made available to persons filing *in pro per.* REPORT II, *supra* note 12, at 10. The respondents stated that cost was the number-one factor in choosing between legal services. *Id.* at 14. For those respondents who received assistance from a lawyer, 30% paid no fee (assumedly the assistance was through a legal service program or private pro bono service), but 8% paid over $750. *Id.* Of those using another kind of provider, 42% paid between $100 and $250, but only four percent

a factor of the differences in quantity and quality of services offered. The price for a stenographer's typing and filing of a pre-made divorce form should not equal the price for a lawyer's preparation of a divorce tailored to a specific client.[142]

The Committee and other deregulation advocates argue, however, that this price differential is not based on the fact that attorneys may provide advice and instruction along with their services.[143] Instead they assume that the fees charged by lay practitioners will remain measurably lower even after lay practitioners are allowed to offer legal advice and instruction. This assumption itself rests on two underlying assumptions: that presently there are few, if any, attorneys providing help with immigration, landlord-tenant, divorce, and other types of services that lay practitioners would provide; and that even if attorneys are providing these services, barriers to entry such as law school tuition and entrance exams drive the price of these services well above what lay practitioners would charge for the same services if deregulated.[144]

The first underlying assumption arguably is incorrect because many lawyers do provide these services.[145] The second underlying assumption is debatable. The effects of licensing requirements, including education and bar exams, do not manifest themselves necessarily in higher fees. One study found ambiguous correlations between exam failure rates, aggregate attorney income, and corre-

paid over $750. *Id.* Because the Report did not break down the services with the costs, it is not possible to determine if a more complete service provision or different type of provision caused the price differential.

In contrast, data compiled by the National Association for Independent Paralegals actually shows that independent paralegals may charge *higher* fees than lawyers for bankruptcy services and comparable fees for probate services. *Choosing an Independent Paralegal*, Nolo Press News, vol. 10, No. 3, Fall 1990, at 3.

From the above, obviously whether lay practitioners charge more for their services depends on the type of service rendered.

142. Note, however, that if the divorce sought is "simple," non-contested, and does not involve children, then the price differential becomes significant. This anticipates the basis for this Note's argument, *see infra* Part IV A, that certain legal services that are capable of standardization can be offered safely and less expensively by lay practitioners than by most fully-trained lawyers.

143. One study shows that consumers, at least, perceive that a difference exists between lay practitioners' services and lawyers' services. The ABA study, *see supra* note 54, found that a significant number of persons (43%) who had used a lay practitioner to resolve a legal problem *did* believe that a lawyer would have made a difference in the outcomes of their cases. *Id.* at 34, *reprinted in* REPORT II, *supra* note 12, at Supp. Appendix 14.

144. *See* REPORT I, *supra* note 12, at 11. A corollary to the latter assumption is that lay practitioners will not increase their fees to cover the costs of additional education required to offer deregulated personalized legal services and insurance necessary to guard against potential liability if they incompetently provide these services. This assumption may be unrealistic.

145. *See infra* notes 141, 205 and accompanying text.

sponding costs to clients.[146] Supply alone cannot be the culprit: as of 1988 there were more than 725,000 licensed lawyers in the United States.[147] For the academic year 1988-1989, 45,999 lawyers were admitted to the American Bar,[148] and 6144 were admitted to the California Bar.[149] Moreover, California has especially low barriers to entry due to less stringent law school requirements.[150] Thus, the assumptions may be somewhat optimistic that a lay practitioner's fees would be significantly lower if a lawyer and lay practitioner were to offer the *same* services.

(2) Free Market's Emphasis on Cost and Possible Resulting Lower Quality of Legal Services

Even if it were true that lay practitioners can provide the same services at a lower price, a pure market system may encourage im-

146. Getz, Siegfried & Calvani, *Competition at the Bar: The Correlation between the Bar Examination Pass Rate and the Profitability of Practice,* 67 VA. L. REV. 863, 879 (1981) ("contrary to the conclusions drawn by several earlier reports, bar exams may not be anti-competitive"). Admittedly, bar exams do exclude a good proportion of the would-be bar. Out of a total of 67,888 people who took bar examinations in 1988, 45,054 passed, for a passage rate of approximately 66%. THE LAWYER'S ALMANAC 1990, *supra* note 135, at 257. In California, out of the 11,741 who took the February 1988 and July 1988 bar exams, 5851 passed, for a 49.8% passage rate. Of those who passed, 4878 were from ABA approved schools, 924 from unaccredited law schools, and 4 by law office study. *Id.* at 255. A person may take the bar exam an unlimited number of times.

147. THE LAWYER'S ALMANAC 1990, *supra* note 135 at 163-64.

148. *Id.* at 260.

149. *Id.* This number may overrepresent the number of lawyers, however, because a person may seek admission to more than one jurisdiction.

150. The Bar allows persons to practice law upon the passage of two education or apprenticeship requirements. First, before beginning the study of law, a person must have completed two years of college work or "[h]ave attained in apparent intellectual ability the equivalent of at least two years of the college work hereinabove defined." CAL. BUS. & PROF. CODE § 6060(c) (West 1990). Second, a person must either have graduated from an accredited law school or:

> [s]tudied law diligently and in good faith for at least four years, in any of the following manners: (i) [i]n a law school that is authorized or approved to confer professional degrees and requires classroom attendance of its students for a minimum of 270 hours a year; (ii) [i]n a law office in this state and under the personal supervision of a member of the State Bar of California who is, and for at least five years last past continuously has been, engaged in the active practice of law; (iii) [i]n the chambers and under the personal supervision of a judge of a court of record of this state; (iv) [b]y instruction in law from a correspondence law school . . . requiring 864 hours of preparation and study per year for four years . . . ; (v) [b]y any combination of the [above] methods . . . .

Id. § 6060(d). In contrast, most states do not allow students of unaccredited schools or persons under a bar member's tutelage to take the state's bar exam. For example, besides California, only three states—Vermont, Virginia, and Washington—permit law office study to substitute for law school. THE LAWYER'S ALMANAC 1990, *supra* note 135, at 237. Only Massachusetts, New York, and Wyoming permit a combination of education and law office study to suffice. *Id.*

proper motives among legal service providers and consumers. The market's emphasis on cost could result in lower quality legal services. One commentator asserts, "[W]here the market fails to provide adequate information about quality, and instead encourages the consumer to choose services for cost alone, suppliers would be pressured to provide services more cheaply and at a lower quality than would truly be in the public's interest."[151]

Of course, individuals may prefer some legal help to none at all,[152] but an individual's financial position should not be the sole factor determining which level of services she receives.[153] As one commentator asserts, "[T]he resolution of such questions may be far more important to the poor person or the person of moderate means than the actual economic value of the case."[154] Legal rights cannot always be measured effectively in economic terms. Critics traditionally have found this to be true for criminal cases and civil rights cases.[155] Certain family law, housing, and credit matters such as welfare entitlements, at least, should also be considered with the traditional cases. The poor person or person of moderate means may value receiving custody of her children, having her landlord fix the

151. Michelman, *supra* note 15, at 21 n.75. Michelman argues that since individuals might often choose to benefit their personal interests over the public interest, the use of a free market would likely reduce the efficiency and increase the social cost of the administration of justice; thus the preservation of the judiciary system is an appropriate aim of government regulation. *Id.* at 21. Moreover, Judge Samuel L. Bufford of the U.S. Bankruptcy Court in Los Angeles asserts that "unlicensed legal advisers cause the filing of enormous numbers of bankruptcy cases that have no business in bankruptcy court." REPORT I, *supra* note 12, at 36 (quoting Judge Bufford's written comment).

If Michelman's and Judge Bufford's assertions are that lay practitioners increase the number of claims brought at the expense of the quality of the claims' presentations (as addressed in Part III C), then deregulation also could increase the government's financial burden in operating the courts. During fiscal year 1982, the estimated cost to the federal government of a tort suit filed in a U.S. District Court was $1740 and in certain tort cases tried to juries, the average cost was $15,028; the federal government obtains only $60 per case in filing fees. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases,* 99 HARV. L. REV. 1808, 1812 (1986) (quoting J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES xviii, xix (Rand Inst. for Civil Justice 1982); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 132 (1985)).

152. "They [the Bar] are protecting people who don't want to be protected . . . . [T]hey are protecting people who are perfectly willing to take their chances [without a lawyer]. While it is absolutely correct that there is some risk [of getting bad advice,] many of these are people who have nothing to lose." Sylvester, *supra* note 2, at 1, 48, col. 1 (quoting Alan Morrison of the Public Citizen Litigation Group, a Washington-based public service group founded by Ralph Nader).

153. B. CHRISTENSEN, *supra* note 15, at 48.

154. *Id.*

155. *Id. See, e.g.,* Carlin & Howard, *Legal Representation and Class Justice,* 12 UCLA L. REV. 381, 386-90, 392-97 (1965).

heater, or getting the government to recalculate her food stamp allotment at a price that would justify the retention of a fully-trained lawyer, but she may only be able to retain a lay practitioner whose experience and expertise lies in filling out and filing divorce forms.[156] The response that this problem exists to some degree right now does not justify amplifying the problem. And to do so in the name of helping the poor person and the person of moderate means gain access to the law cannot be condoned.

(3) Informational Deficiencies Inherent in the Free Market

Another problem with the free market stems from the difficulty in attaining correct information or making use of information when it is available. The market, like the law itself, is complex. People often are unaware of their need for legal services and the availability of dependable services.[157] This lack of information is exacerbated by the fact that many people fear "the law"[158] and the high costs of acquiring legal help.[159] Most consumers cannot adequately distinguish

156. The 1989 ABA nationwide study, *supra* note 54, found that the most frequently mentioned legal problem suffered by consumers was related to medical issues—14.6%. These issues included problems with access to medical help and medicare and other government benefits. ABA STUDY, *supra* note 54, at 21-22. Public benefits followed, accounting for 13.4% of the problems. These include problems with food stamps, welfare, and SSD/SSI. *Id.* at 22. The remaining rank of problems included: utility—12.2%; family—12%; discrimination—11.8%; consumer—11.4%; employment—10%; housing—9.6%; school—4.6% and other—4.2%. *Id.* at 21.

157. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar,* 12 UCLA L. REV. 438, 438 (1965). The General Accounting Office of the U.S. Comptroller General conducted a survey of 1260 poor persons eligible for free legal services. Of those interviewed, 60% were not aware that free legal services were available, and only about half of those who were aware knew the types of services offered. Report to the Congress, Comptroller General of the U.S. at v (1978). The ABA Study on legal needs discussed *supra* also studied low income households' knowledge of lawyers' services. Those respondents who indicated that they had a civil legal problem but no lawyer were questioned about the reason: 28.3% thought a lawyer was too expensive; 22.1% believed they could handle the problem themselves; 17.5% did not know how to get a lawyer; 13.7% thought a lawyer could not help; 6.6% cited "other" reasons; 5.9% used non-lawyer assistance; and 5.9% asked and were refused service. ABA STUDY, *supra* note 54, at 33-34. With the benefit of hindsight, however, more than 43% of these same respondents believed that a lawyer would have made a difference. *Id.*

158. Many perceive law as being a mysterious force they can neither understand nor control. *See* Cheatham, *supra* note 157, at 438.

159. A limited private survey conducted by James Frierson, a professor at Eastern Tennessee State University, found that the middle class overestimated lawyers' fees by 91% for the drafting of a simple will, 123% for a one-half hour consultation and advice session, and 340% for the reading and giving of advice on an installment contract. Frierson, *Legal Advice,* BARRISTER 8 (Winter 1985).

between differences in legal quality and lawyer competence.[160] These problems render the utility of allowing lay practitioners to practice law without any guidelines dangerous.

These dangers are particularly acute for the poor and persons of modest means who lack access to legal services. The Connecticut study on divorce kits showed that the kits "brought no measurable relief to the area's indigent population."[161] Instead, the study showed that the persons who most benefitted from the kits were a small minority of young and well-educated couples.[162] The problem with these and other do-it-yourself publications is that the written, generalized instructions assume threshold levels of education, clerical competence, and self-confidence that may exceed those of many of the poor and lower middle class.[163]

Even if personalized instructions and advice by lay practitioners are legalized, it is questionable whether the poor and lower middle class will fare any better. The difficulty in understanding the written, generalized instructions, may be alleviated. Allowing lay practitioners to provide instructions, however, will not necessarily cure all informational deficiencies. Arguably, the people who will benefit from the Committee's proposal will be those with the financial means, cultural familiarity, linguistic facility, education, and self confidence to gain access to enough information about the various legal services to determine what their legal needs are and who can best provide for these needs.[164] Realistically, the poor and the lower middle class more likely lack these resources than other segments of the population.

In sum, the deregulation advocate's free market is premised on simplicity: supply and demand. Legal services, however, are unlike products that are freely traded on the market: the consumer of legal services cannot pick up a sample of a legal service like a piece of fruit and test it for value. Legal services cannot and should not always be evaluated by price alone.

C. The Competence Factor: Relevance and Possible Regulation

Another problem with the Committee's proposal is its lack of competency requirements. Both the Committee and Rhode assert that

160. Michelman, *supra* note 15, at 21 n.75. Michelman argues that most consumers cannot adequately distinguish between differences in quality and competence because either there is a lack of information or consumers cannot make use of such information when available. *Id.* at 20 n.74, 21.

161. Project, *supra* note 72, at 163.

162. *Id.*

163. *Id.* at 160-61.

164. Michelman, *supra* note 15, at 21.

limited findings of consumer harm do not justify the present regulations of the unauthorized practice of law.[165] Although Rhode admits that "training equips lawyers with a global perspective not shared by lay practitioners, and thus may facilitate recognition of legal issues ancillary to the matter at hand,"[166] she discounts the need for such training for lay practitioners.

Rhode's and the Committee's surveys on the extent of consumer harm from lay practitioners, however, are unreliable.[167] In particular, the surveys lack foundation: neither survey uses a sufficiently large sampling to generate confidence in its results. In Rhode's survey, less than half of the jurisdictions studied kept records of the complaints they received.[168] In the Committee's survey, only about one quarter of the California protection agencies responded.[169] Of the thirty-two state bars that responded, less than sixty percent kept or could recreate statistics.[170]

Rhode suggested that the 2,669 complaints, inquiries, or investigations concerning lay practitioners received by unauthorized practice of law officials in 1979 constituted an insubstantial number.[171] This was not inconsequential for California, however: California accounted for more than half of the total number.[172] Rhode herself admitted that "it is likely that this total significantly underrepresents" the true volume of complaints due to the absence of data from key states.[173]

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165. *See supra* notes 66-74, 96-97 and accompanying text.

166. Rhode, *supra* note 1, at 88.

167. *See* Michelman, *supra* note 15, at 38 (Rhode's research is "confusing and inconclusive").

168. Out of the 45 jurisdictions Rhode used for her analysis, only 22 kept records and only 12 published information. Rhode, *supra* note 1, at 21.

169. Of the 126 consumer protection surveys sent, only 31 were returned. REPORT I, *supra* note 12, at 5.

170. Of the 54 state bar surveys sent, 32 were returned. Seventeen of the 32 respondents did not keep statistics on the number of complaints received and only four of those could provide estimates. This left the Committee with 19 state reports on which to rely. *Id.* at 5, 40. The Committee concluded that "there are virtually no hard data concerning the subject matter of our Committee's charge. If there are any significant statistical data, we were unable to find them. Even our own investigation and surveys did not provide sufficient data for us to create meaningful statistical analyses." *Id.* at 7.

171. Rhode, *supra* note 1, at 22.

172. *Id.* This could be due to a number of factors: stricter unauthorized practice of law legislation than in most jurisdictions (although California's laws appear to mirror those of a majority of states, *see supra* note 13); stronger unauthorized practice of law enforcement than in other states (at least for the dates in question); or possibly a larger number of lay practitioners causing harm.

173. Rhode, *supra* note 1, at 22 (the excluded jurisdictions are New York, Maryland, Connecticut, Tennessee, and Washington).

Problems with Rhode's survey arguably go beyond this. Her analysis of consumer injury focused on complaints issued directly by injured clients.[174] This ignores complaints brought by judges, opposing lawyers, or lawyers subsequently representing these consumers.[175] No doubt clients themselves also do not report a number of complaints.[176] Indeed, prior to filing a complaint, a client must discover that she has been harmed by a lay practitioner in time to remedy the problem. Furthermore, she must have suffered a degree of harm justifying the time and expense of filing and pursuing a formal complaint. The client may not even be aware that she can be helped or know where to go for this help.

A confidence factor also would affect the number of complaints and inquiries that injured clients bring. Individuals who initially avoid lawyers, either from a lack of funds, ignorance, or distrust, similarly may lack confidence to go to lawyers or bar associations to remedy a problem caused by a lay practitioner. Some individuals, such as immigrants with possible illegal status, may fear they will be penalized for reporting to legal officials.[177]

Lastly, both Rhode and the Committee surveyed client harm caused by lay practitioners under circumstances in which the unauthorized practice of law rules operated as a deterrent to some extent. Without such deterrence, consumer harm inevitably would increase because the number of lay practitioners offering their services would increase.

Even after an injured consumer discovers her injury and her ability to redress the injury, and finds an attorney or free legal service agency to accept her claim (or decides to file *pro se*), she still must bring a successful claim. If a lay practitioner actually misrepresents herself as a licensed attorney, the consumer can sue under the traditional tort theory of misrepresentation.[178] Arguably, however, practitioners that misrepresent themselves often will be those who either

174. *Id.* at 33.

175. *See* Michelman, *supra* note 15, at 39.

176. Michelman also shares this view; she asserts that injuries may not get reported to bar officials because:

> cases involving the most obvious types of harm to the consumer are probably the least likely to go to trial or be appealed. Furthermore, to the extent that the courts may presume the existence of harm without requiring actual proof, the parties may have no incentive to litigate this issue.

Id. at 38.

177. *Id.* at 39; Rhode, *supra* note 1, at 32-33.

178. *See* McKay v. Longsworth, 211 Cal. App. 3d 1592, 260 Cal. Rptr. 250 (*reh'g denied* 1989) (upholding tort damages resulting from a suit against the plaintiff by a lay practitioner misrepresenting himself as a lawyer).

lack the financial resources to remedy their wrongs or simply will take flight before they are brought to justice.[179] If the consumer knowingly hires a lay practitioner and thus is not deceived by the practitioner's status, she will have to sue under a contract[180] or tort theory of malpractice. Since the consumer often may not have a contract with the lay practitioner, however, the contract option often will be closed. The malpractice theory also has proven an unreliable source of relief for injured consumers.[181] Early cases refused to hold a lay practitioner liable for damages absent privity of contract.[182] *Biankanja v. Irving*[183] was the first case to allow damages based on negligence. In *Biakanja,* the court disapproved of the earlier cases requiring a contract-based claim and held that whether a lay practitioner would be held liable to a third person was a question of public policy.[184] The court balanced a number of factors:

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[185]

Ten years later in *Bland v. Reed,*[186] however, the court refused to hold a lay practitioner to a duty of care absent a contract for services implying any warranty; the court stated that the negligent nonperformance of an obligation voluntarily assumed did not give rise to a duty.[187] Thus, because of the difficulties in initiating and successfully winning a trial, a consumer needs additional protection to en-

179. See REPORT I, *supra* note 12, at 35, 37, for examples of this occurrence.

180. *See In Re* Anderson, 79 Bankr. 482 (S.D. Cal. 1987). In rescinding and restituting all monies paid under a contract between the defendant paralegal service and the plaintiff for bankruptcy services, the court relied on "California law [which] has long held that a contract executed in violation of a statute which requires one of the parties to be licensed will not be enforced." *Id.* at 485.

181. As a general rule, the entrustment of a legal problem to a lay practitioner effectively prevents the consumer from maintaining a civil remedy for malpractice. Michelman, *supra* note 15, at 17-18. See Rhode, *supra* note 1, at 94-95, for the assertion that a malpractice suit presently is an unsuitable response to pervasive incompetence or misfeasance.

182. Buckley v. Gray, 110 Cal. 339, 342-43, 42 P. 900, 900 (1895); Mickel v. Murphy, 147 Cal. App. 2d 718, 721-22, 305 P.2d 993, 995-96 (1957) ("disapproved" in Biakanja v. Irving, 49 Cal. 2d 647, 728, 320 P.2d 16 (1958)).

183. 49 Cal. 2d 647, 320 P.2d 16 (1958).

184. *Id.* at 650, 320 P.2d at 19.

185. *Id.*

186. 261 Cal. App. 2d 445, 67 Cal. Rptr. 859 (1968).

187. *Id.* at 450-51, 67 Cal. Rptr. at 862-63. Here the defendant did not represent that he was an attorney; he merely gave legal advice to the plaintiff. *Id.* at 448-49, 67 Cal. Rptr. at 861.

sure that injury will not occur or that if it does occur, it will have a greater likelihood of being remedied than it has presently.[188]

D. The Danger that Lay Practitioners May Be Used as an Excuse To Curtail or Abolish Free Legal Services

Because deregulation may not benefit the middle class and may even harm the poor, the biggest danger presented by deregulation is that the existence of lay practitioners may be used as an excuse for further cuts in free legal services to indigents.[189] This danger is far from imagined. In fact, William C. Durant III, former chairman of Legal Services Corporation, advocated deregulating the legal profession *in connection with* dismantling Legal Services.[190] He argued that deregulation would create a utopia of "shared vision," which would "unleash the tremendous energies of a free and creative people to bring about an open and competitive system of resolving disputes and providing access to justice for all people."[191] Durant likened the results of the deregulation of legal services to the results created by the "[d]eregulation in the trucking, airline and railroad industries . . . all [of which] reflect this positive development for consumers."[192] Time has shown, however, that the harm from deregulating

188. *Cf.* Note, *supra* note 1, at 1543-44 (arguing that although problems of consumer information exist because many clients are unable to ascertain the nature and acuity of their problems without experts, legal problems outside the criminal cases do not cause fatal or irreparable harm and the malpractice system provides adequate protection against legal incompetence).

189. *See* Michelman, *supra* note 15, at 21 n.76 ("[d]eregulation could be used as an excuse to force the poor, who have no choice as to quality, either to rely on the lowest quality services available in that market, or to forego any services at all").

190. *Durant: Let's Help the Poor by Abolishing LSC,* Legal Times, Feb. 23, 1987, at 17, col. 1 (excerpts from speech given at the ABA mid-year meeting in New Orleans in Feb. 1987) [hereinafter *Durant*]. Durant, a Reagan appointee, presumably shared at least part of Reagan's vision of abolishing government aid for legal services. *See e.g.,* R. BROWNSTEIN & N. EASTON, *supra* note 56, at 425 (noting that Reagan frequently appointed as head of an agency someone who opposed the agency's purpose; Legal Services was no exception); Thomas, *supra* note 127, at 2, col. 4 (asserting that Durant's proposal "is a cover for destroying the Legal Services Corporation"). The concerns regarding Legal Services Corporation defunding have not ceased with the expiration of President Reagan's term of office. On the contrary, the combination of President Bush's conservative viewpoint on welfare funding and the weak state of the economy keeps the issue very relevant. *See, e.g.,* Barr, *Doers and Talkers,* THE AM. LAW., July 1990, at 51 (George Wittgraf, an attorney appointed by President Bush to chair Legal Services Corporation, recognizes that Legal Services Corporation is insufficiently funded but foresees only "modest increases" in the Legal Services Corporation budget under the President's stewardship).

191. *Durant, supra* note 190, at 17, col. 2.

192. *Id.* at 17, col. 4.

industries such as the airlines and the banks has outweighed the benefits.[193]

If free legal services for civil claims were further deregulated or even abolished, forcing the poor to use a different and arguably less competent source of legal help than that available to persons with financial means, the Constitution's equal protection and due process clauses may be implicated.[194] Technically, if both the rich and the poor are required to pay the cost of attorney's fees, there is no overt discrimination violating equal protection. An equal protection argument would have to stand on disproportionate impact alone. The courts, however, have not been willing to use heightened equal protection review based solely on disproportionate impact.[195] Most commentators predict that the courts will not recognize an equal protection claim to abolish all wealth discrimination regarding civil claims.[196]

Due process may provide a more successful argument. One commentator has argued, "[I]n civil cases when expert testimony or consultation is critical to a successful outcome, the fundamental fairness query of due process analysis requires that indigents be given the

193. A study by the Economic Policy Institute, a Washington research center, has shown that airline deregulation actually has resulted in higher air fares and poorer service. Ramos, *Airline Deregulation Rapped,* San Francisco Chron., Mar. 29, 1990, at D4. *See also* Lovett, *Moral Hazard, Bank Supervision and Risk-Based Capital Requirements,* 49 OHIO ST. L.J. 1365, 1376-77 (1989) (asserting that one reason for the U.S. banking failures was the Reagan Administration's relaxation of banking regulation); Wiley, Patrick, Tisch, Blake & Breger, *Broadcast Deregulation: The Reagan Years and Beyond,* 40 ADMIN. L. REV. 345, 347 (1988) (noting the skepticism surrounding the benefits of air transportation and rail deregulation that occurred during the Reagan years). For further information on bank risks, failures, and regulatory strategies, see G. BENSTON, R. EISENBEIS, D. HORVITZ, E. KANE & G. KAUFMAN, PERSPECTIVES ON SAFE & SOUND BANKING 28-33, 175-77, 245-71 (1986).

194. Professor Lawrence Tribe has argued that there should be a "right of judicial access," including the right to an attorney, woven from strands of doctrine based upon equal protection, procedural due process, and the first amendment rights of speech and petition, supported by the ninth amendment. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-18, at 759 (2d ed. 1988). Another commentator has advanced, and ultimately rejected, the argument that the first amendment's right to petition the judiciary provides support for an indigent's right to expert assistance in civil trials. This argument can be extended to apply to the right to an attorney. *See* Medine, *Expert Assistance in Civil Cases,* 41 HASTINGS L.J. 281, 284 n.12 (1990) ("the first amendment provides only a right to *access,* not to *assistance* in taking advantage of that access").

195. *See e.g.,* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977) (disproportionate impact, standing alone, is not enough to trigger heightened equal protection review, even in the context of race). Even in criminal cases, the courts have been unwilling to rely on equal protection. In Ross v. Moffitt, 417 U.S. 600 (1974), Justice Rehnquist, writing for the majority, asserted that the state's duty "is not to duplicate the legal arsenal that may be privately retained by a criminal defendant." *Id.* at 616.

196. *See, e.g.,* Medine, *supra* note 194, at 298-303 (arguing that equal protection principles will not justify a right to expert assistance for poor persons).

opportunity to obtain expert assistance."[197] This argument essentially involves the payment of funds to third parties to assist in presenting claims. In that sense, an attorney is analogous to the expert witness and the right to an attorney in the same circumstances then follows.[198] Commentators aside, however, the Supreme Court has "demonstrated hostility to the appointment of counsel for indigent civil litigants."[199]

Deregulation thus has the added danger of providing an excuse to curtail funds for free legal services that will not be alleviated by the courts. Although deregulation seeks to increase the access of the poor and middle class to legal services, it actually may curtail access. The Bar, therefore, as the avowed protector of the public,[200] must ensure that its final proposal will not be used as a means of abolishing free legal services.[201]

197. *Id.* at 303.

198. The suggestion that indigents should have a right to appointed counsel in civil cases is not novel. Other countries have allowed for this statutorily and constitutionally. *See e.g.*, R. SCHLESINGER, COMPARATIVE LAW 276 (3d ed. 1970) ("Most civil law countries have long recognized Legal Aid as a public function to be regulated by law. Statutory schemes . . . make sure that in civil as well as criminal litigation an indigent party will be represented by competent counsel."); O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach,* 28 OHIO ST. L.J. 1, 5 (1967) (the Swiss Constitution guarantees the right to counsel in civil cases); Note, *The Indigent's Right to Counsel in Civil Cases,* 76 YALE L.J. 545, 551 (1967) (free legal counsel for the poor is provided by most industrial nations).

199. Medine, *supra* note 194, at 319; *see e.g.*, Lassiter v. Department of Social Serv., 452 U.S. 18, 31 (1981) (using a rebuttable presumption *against* the right to counsel in civil cases when no loss of liberty would result, the Court held that the plaintiff's rights were not violated by a state's proceeding terminating her parental rights in which she had no counsel). Since *Lassiter,* state courts have had an opportunity to review the constitutional right to appointment of counsel in civil cases. When a fundamental deprivation of liberty is threatened in civil proceedings such as civil contempt, commitment, paternity, and termination of parental rights proceedings, some courts have held there is a right to counsel. *See e.g.*, Davis v. Page, 640 F.2d 599, 602-04 (5th Cir.) (right to counsel in termination of parental rights cases), *cert. denied,* 464 U.S. 1052 (1981); McKinstry v. Genesee County Circuit Judges, 669 F. Supp. 801, 804 (E.D. Mich. 1987) (right to counsel in civil contempt proceeding based on *Lassiter*); Salas v. Cortez, 24 Cal. 3d 22, 28, 31-34, 593 P.2d 226, 231-34, 154 Cal. Rptr. 529, 533, 535-37 (1979) (right to counsel in paternity proceedings when the state is an adversary or the mother is represented by the state); State *ex rel.* Cody v. Toner, 8 Ohio St. 3d 22, 24, 456 N.E.2d 813, 814-15 (1983) (right to counsel in paternity proceedings based on federal and state due process clauses); *see also* Note, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support,* 50 U. CHI. L. REV. 326 (1983) (right to counsel in child support cases) (authored by Robert Monk). The recognition by state courts of a right to counsel in civil cases when a fundamental deprivation of liberty is threatened would provide some protection to indigent litigants. But this right seems to be far from well-recognized, a fact that should be the source of discomfort to the state legislature that deregulates the practice of law without providing a correlative alternative access to legal help through increased funding of free legal service organizations.

200. *See supra* notes 16-20 and accompanying text.

201. While this Part has stressed the personal effect of abolishing free legal services to

V. Licensure as a Better Alternative to Deregulation

A minimum-level licensing scheme is the best method to remedy lack of access to and control over the legal system while still ensuring that individuals, especially those with limited financial resources, and the judicial system are not harmed.[202] Under this scheme, individuals who have obtained a minimum level of efficiency would be permitted to practice in areas that have been predetermined to be standardized and not to require a high level of legal skill to perform. These individuals would be required to register with a state agency and would be bound by the same ethics standards as attorneys.

Although this licensing plan would not affect supply and price to the extent that full deregulation would, this plan has the benefit of ensuring some protection from incompetence and fraud. The due process and equal protection issues may not be implicated and informational difficulties will not be as problematic once the consumer's choice becomes less crucial—once the consumer can be somewhat assured that the practitioner she hires is at least competent. As one commentator has explained, "licensure's approach to infor-

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indigents, society too will be affected negatively. This is true not only because unresolved legal problems potentially can hinder an individual's contribution (in all senses of the word) to society, but also because society needs to believe somehow that the law is or at least strives to be freely accessible and fairly applied to all. Further, many Legal Service cases, such as civil rights class action suits, have precedential value and potentially can affect a large number of individuals. *See* Cramton, *supra* note 24, at 553-54. *Cf.* R. BROWNSTEIN & N. EASTON, *supra* note 56, at 429 (citing comment by Howard Phillips, then national director of the Conservative Caucus:

> Whatever the issue, be it OSHA, busing, transsexual benefits claims, election law, expunging arrest records, private school, conscription, and even national defense, the poverty lawyers are being subsidized at public expense to propagate their private views of what is good for the poor and what is good for the country.)

The California Legislature recognizes that the resolution of an individual's legal problems can impact society: "the expansion, improvement, and initiation of legal services to indigent persons will aid in the advancement of the science of jurisprudence and the improvement of the administration of justice." CAL. BUS. & PROF. CODE § 6210 (West 1990).

202. Milton Friedman describes three levels of occupational control. The most restrictive form, licensing, is:

> an arrangement under which one must obtain a license from a recognized authority in order to engage in the occupation. The license is more than a formality. It requires some demonstration of competence or the meeting of some tests ostensibly designed to ensure competence, and anyone who does not have a license is not authorized to practice and is subject to a fine or jail sentence if he does engage in practice.

M. FRIEDMAN, CAPITALISM AND FREEDOM 144-45 (1962). Certification, the mid-ground, allows one to hold oneself out as possessing certain skills and may, but need not necessarily, restrict practice to those certified as possessing those skills. *Id.* The least restrictive form, registration, involves only an official listing of the names of all practitioners. *Id.*

mation problems is to structure consumer choices so that even if consumers do not fully understand what they are buying, they can feel safe from the prospect of being led through ignorance to purchase services of a quality so poor as to compromise their interests."[203] Although Rhode persuasively suggests that freedom to choose in itself justifies full deregulation,[204] freedom to choose only is beneficial if the choices are not illusory. A limited licensing scheme that restricts lay practitioners to certain areas in which they have shown an aptitude would help remedy the problem of lay practitioners' intentionally or unintentionally handling a legal problem they are incapable of handling. Thus an individual who requires services that have been deemed capable of being handled by a nonlawyer can choose between a full-fledged lawyer or a lay practitioner.

A. Appropriate Areas in Which Lay Practitioners May Operate

Licensure of lay practitioners would be appropriate in certain areas in which the legal claim does not require a lawyer's high level of expertise. One commentator analyzed the standardization of legal services and found that "there is reason to believe that standardized or standardizable legal services form a large portion of the practice of many lawyers."[205] He cites as the most standardizable areas of law: uncontested divorces, preparation of wills and trusts, preparation of income tax returns, probate services, and certain real estate matters. The next level of standardizable areas are: uncontested adoptions, simple personal bankruptcies, collections, changes of name, and incorporations of small businesses.[206] Because these types

203. Note, *supra* note 1, at 1542; *see also* Michelman, *supra* note 15, at 14 (lack of information and inability to make use of available information is partially alleviated by licensing).

204. *See supra* note 63 and accompanying text.

205. Engel, *supra* note 9, at 842-43.

206. *Id.* at 842. Engel examined five factors to determine which services are standardized and standardizable, including: the use of fixed fee rates, the delegation of work by lawyers to lay assistants, the use of automation and computer technology, the application of systems analysis techniques, and the extent of encroachment by lay practitioners in that area. *Id.* at 822-41.

For specific areas of standardization, see Project, *supra* note 72, at 140 ("Clearly, professional expertise is not a prerequisite for the completion of dissolution forms. Discretion in form selection and preparation is minimal, and errors are either readily correctable [sic] or inconsequential."); Lancaster, *Rating Lawyers: If Your Legal Problems are Complex, a Clinic May Not be the Answer,* Wall St. J., July 31, 1980, at 1, col. 1 (asserting that attorneys in California rarely participate in residential real estate sales because retaining counsel may be tantamount to "hir[ing] a surgeon to pierce an ear") (quoting Robert Ellickson, a law professor specializing in real property, regarding the use of a major Los Angeles law firm for a home sale).

of law require less legal expertise, lay practitioners may competently perform them.[207] Borrowing from one commentator's analogy, doctors and dentists, like lawyers, cost too much; and while no one suggests letting an untrained person operate, lay people, under the supervision of registered nurses, instead of licensed opthalmologists and otolaryngolists, regularly screen school children for vision and hearing defects.[208]

The Commission has been charged with ascertaining the areas of practice and scope of tasks that lay practitioners may perform.[209] Its findings can be used to effectuate a licensing program.[210] The Commission's determination should be subject to evolution: future advancements in law may justify extending the areas in which lay practice is allowable and, alternatively, complexities may arise that warrant curbing those areas. The agency set up to regulate the lay practitioners should designate a committee to be responsible for performing a continuing study of the areas of law that can be added and dropped from the licensing program.

B. Competence Requirements

Competence requirements must be balanced carefully—competence on one side, the price of acquiring competence on the other. Competency can be ensured by requiring either the attainment of a certain level of education or the passage of a rudimentary examination testing the area or areas in which the lay practitioner wishes to practice. Educational requirements should encompass a variety of learning resources, including paralegal schools and apprenticeships. Awareness of the various standardized legal forms needed for the practitioner's specialty and how to prepare these forms should be emphasized. The certificate issued to a lay practitioner should specify the area or areas in which the lay practitioner is proficient to practice. A lay practitioner's certification in specific areas would define her

207. Standardized or routine services form "a large portion of the practice of many lawyers." Engel, *supra* note 9, at 842-43.

208. *See* B. CHRISTENSEN, *supra* note 15, at 52.

209. *See* Resolution, *supra* note 113. Due to time constraints, the Commission limited its study to the same four areas that the Committee studied: bankruptcy, family law, immigration, and landlord-tenant law. REPORT II, *supra* note 12, at 9.

210. The Commission proposed licensing lay practitioners in bankruptcy, family law, and landlord-tenant law. REPORT II, *supra* note 12, at 1. See *id.* at 19-25 for a condensed version of the Commission's conclusions on each area of law, and Report II Exhibits 7-10, (available at the California State Bar Office of Professional Standards), for the full reports in each division.

competence and there would be no guarantees of competence beyond these specific areas.

C. Ethical Constraints on Lay Practitioners

Under this proposed licensing plan, lay practitioners would be subject to the same ethical constraints as attorneys.[211] Other professional groups are already under this type of ethical licensing restraint, including groups as diverse as accountants and cosmetologists.[212] An important ethical restraint should be the prohibition on accepting or retaining a case that the practitioner determines she cannot handle competently; a similar restriction presently binds attorneys.[213] Registered lay practitioners also should be granted client confidentiality privileges similar to those held by attorneys.

D. Prophylactic and Remedial Measures

Waiver requirements,[214] as suggested by the Committee,[215] can provide additional prophylactic relief beyond the competency and ethics standards. Without such a waiver, licensing could mislead consumers to believe that the Bar or licensing agency is representing the equality of lay practitioners and licensed lawyers because of the Bar's history of tight regulation of the practice of law. Each practitioner would be required to obtain a signed consent form from each client acknowledging that the client knows the practitioner is not a licensed attorney of the California Bar. Considering the extent of abuses found to have been made by immigration specialists and notaries,[216] waivers should be written in the native language of the client. The consent

211. See Rhode, *supra* note 1, at 94 for this suggestion.

212. *See* CAL. BUS. & PROF. CODE § 5081 (West 1990) (accountants); *id.* § 7332 (cosmetologists). Furthermore, a licensing board may deny a license to a person convicted of a crime or deemed to have committed an act involving dishonesty, fraud, or deceit with the intent of substantially benefitting herself or injuring another. *Id.* § 480.

213. CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-110(B) (1989).

214. Rhode, *supra* note 1, at 95 ("Although the effectiveness of disclosure regulation has varied in different commercial and professional contexts, there is some basis for believing that intelligibly drafted statements can facilitate informed consumer choice"); *see also* Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession,* 128 U. PA. L. REV. 41 (1979) (analyzing the effect on lawyers and desirability of the use of an informed consent doctrine and concluding that this would facilitate and encourage dialogue between lawyers and clients). *But see* Michelman, *supra* note 15, at 24 ("[M]andatory disclosure of risks is a weak way of protecting the public . . . . It assumes that people will understand disclosed information and will use it to make an appropriate calculation of their interests.").

215. REPORT I, *supra* note 12, at 11.

216. *See supra* note 91.

form should include the lay practitioner's license identification number and the area or areas of practice in which she is licensed to perform. The licensing agency should keep public registration records on lay practitioners that state the areas of law in which they are allowed to practice and any complaints, disciplinary actions, or court convictions brought against them. The registration and continuous update of each practitioner's name and address will shorten the official response time for locating a possibly errant practitioner and will help prevent the responsible party from disappearing.

Consumers harmed by licensed lay practitioners should not be forced to rely on contract law or on the tort of misrepresentation, but should be able to sue for malpractice. The same standard of care presently imposed on attorneys[217] also should be imposed on lay practitioners.[218]

Another protective measure that will ensure to some extent the continuing competence of lay practitioners is mandatory continuing education.[219] The California Legislature recently enacted a requirement that the Bar request the California Supreme Court to adopt a rule of court authorizing the Bar to establish and administer a mandatory continuing education program for members of the Bar.[220] Like the Bar's continuing education,[221] the program for lay practitioners should require that some of the educational requirements include ethics training.

As a final further protective measure, part of the licensing fee paid by lay practitioners should be put into a client fund similar to that presently reserved by the Bar for clients who are harmed by attorneys.[222] When a client is injured by a lay practitioner who cannot

217. Rule 1.1 of the MODEL RULES OF PROFESSIONAL CONDUCT establishes certain guidelines on lawyer competence; competence is "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1989). Michelman defines competence as a "set of qualities shared by lawyers of relatively similar backgrounds." Michelman, *supra* note 15, at 16.

218. Michelman, *supra* note 15, at 15-19.

219. Michelman also suggests requiring mandatory continuing education or submission to periodic license review. *Id.* at 18-19 & n.70. *See generally,* Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective,* 1983 WIS. L. REV. 639 (criticizing the bar's obsession with competence).

220. CAL. BUS. & PROF. CODE § 6070(a) (West 1990). This rule must require that within designated 36-month periods, all active members must complete at least 36 hours of legal education approved by the Bar or offered by a Bar-approved provider. *Id.*

221. Eight of these hours must be in legal ethics or law practice management with at least four hours devoted to ethics. *Id.*

222. The client security fund was created in 1972. It may pay clients up to $50,000 for losses due to an attorney's dishonest conduct. From its creation to July 31, 1981, the fund paid more than $1,270,000 in 302 cases. News Background, *supra* note 19, at 9-10. California

or will not pay the damage award either because of financial inability or because she cannot be brought to court, the court may allow the client's damage award to be paid out of the fund.

E. The Proper Agency to Regulate and Police Lay Practitioners

Another issue to resolve is to whom the task of registering and policing lay practitioners should be entrusted. The Bar and the public could be joined together, as is done with other licensed groups.[223] Placing this responsibility in the hands of the Bar would efficiently utilize the persons who arguably have the most expertise in the legal field and who already have a system to regulate the practice of law. It would, however, only partially assuage those who feel that the Bar has a strangle-hold on the legal profession. The alternative that would best quell the public's fears and distrust of the Bar would be combining a consumer protection agency and a prosecutorial agency.[224] The agency's governing board should equally comprise members of the Bar, licensed lay practitioners, and other members of the public not licensed as lay practitioners or lawyers.[225]

(1) Powers of the Agency

The agency charged with supervising lay practice should have certain discretionary powers. According to the Committee's proposal, a lay practitioner's past violations of the law would not affect her registration status; in fact, the Committee does not give the agency *any* power to refuse to grant or to revoke a registration certificate. A better approach would be to allow the agency to use its discretion in denying and revoking a lay practitioner's license. Although the standard need not be as general as the "good moral character" required of Bar members,[226] the agency should at least be able to deny or revoke a lay practitioner's license in response to an ethical violation of the Act or other law, persistent client complaints, or find-

State Bar members are required to pay $25 above the usual membership fee to this fund each year. STATE BAR OF CAL., ANALYSIS OF THE 1988 STATE BAR ASSOC. BUDGET 17 (June 1987).

223. For example, the board regulating cosmetologists is made up of seven persons, three of whom are registered cosmetologists and four of whom are members of the general public. CAL. BUS & PROF. CODE § 7301 (West 1990).

224. The Commission opted to place the control in the hands of the Department of Consumer Affairs. REPORT II, *supra* note 12, at 28.

225. In contrast, the Commission recommended that the board comprise one member of the Bar, two licensed lay practitioners, and four public members. *Id.* at 29.

226. *See supra* note 19.

ings of negligence. The agency also must be empowered with the right to compel a lay person to return files and other work product to the client.

The agency should be required to ensure that lay practitioners only advertise and perform activities they are licensed to provide. A record of a lay practitioner's conviction of any law or customer complaint should be filed with the practitioner's licensing statistics so that a potential customer will have a chance, at least, to discover any prior wrongdoing of the lay practitioner.

The chosen agency must be willing to create and enforce policy goals and rules. Even those commentators who believe that regulating the unauthorized practice of law is valid and essential agree that the bars and courts of each jurisdiction need to clarify the laws and regulate them more consistently.[227] Lay practitioners who wish to practice law must know the exact limits within which they must work.

(2) Bar Involvement in the Agency's Regulatory Activities

There are a number of ways the Bar can expedite this licensing system without imposing on the agency in charge. The Bar could assist the agency while still maintaining a "showing of neutrality" by allowing the state lawyer referral services to recommend licensed lay practitioners to consumers.[228] The Bar also could publish pamphlets informing consumers which legal services are more likely to be effectively performed by technicians.[229]

Regarding its own regulatory structure, the Bar should continue its effort to simplify legal processes when possible.[230] Most importantly, the Bar should maintain an active policy of encouraging voluntary pro bono work by Bar members.

227. Q. JOHNSTONE & D. HOPSON, *supra* note 18, at 173, 189-91; Michelman, *supra* note 15, at 4-6.

228. In 1956, the Bar created certified referral services that permitted persons to recommend lawyers who fulfilled certain standards determined by the Bar. News Background, *supra* note 19, at 13.

229. Michelman, *supra* note 15, at 58 (proposing that the bar publish guides rating self-help publications and listing standards of competence for lay practitioners, as well as expanding the present scope of its own self-help publications). The Bar presently engages in a news-media relations and pamphlet program. In 1981, the Bar distributed approximately one million free pamphlets on consumer rights, the law, and the legal system. News Background, *supra* note 19, at 17-18.

230. Project, *supra* note 72, at 164-65 (suggesting a simplification of the uncontested divorce process). The California Legislature has embraced this policy at least with respect to wills. *See* CAL. PROB. CODE §§ 6240-6241 (West Supp. 1990) (providing a form will, both with and without trust provisions).

Conclusion

Moderation is the key to resolving this crisis. On the one hand, present unauthorized practice of law rules are partially untenable and foster distrust of the legal profession. On the other hand, full deregulation is an idealistic approach that could cause more harm than good. If the poor or people of moderate means must choose between no help and incompetent help, they have no choice at all. The California Bar should allow lay practitioners to provide those particular legal services that can be provided by persons less qualified than fully-trained lawyers at possibly lower costs. Licensing lay practitioners in certain standardizable areas and holding them accountable for certain competence and ethic standards provides a safe answer to the present lack of access to civil legal assistance.